92-1379

FILED
FEB 16 1993
OFFICE OF THE CLERK

No. (1)

# In The
# Supreme Court of the United States
**October Term, 1992**

**Michigan Road Builders Association, Inc., et. al.,**
*Petitioners,*

v.

**The Director of the Michigan Department of Transportation, in his official capacity, et. al.,**
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John Bernard Weaver*
Daniel R.W. Rustmann
Susan Jezewski Evans
**Butzel Long**
150 West Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7000
*Attorneys for Petitioners*

*Counsel of Record

93 pp

## Questions Presented

### I.

To establish Article III standing to challenge a governmental policy limiting consideration of bids for specified highway contracts to those submitted by businesses owned and operated by racial or ethnic minorities or women, must a non-minority business:

1. Seek to be certified as a member of the preferred class;

2. Prepare and submit a bid for a set-aside contract; and

3. Show that he would have been the successful bidder?

### II.

Does the lower court's construction of the Surface Transportation and Uniform Relocation Assistance Act of 1987, which construction requires a state to set-aside up to 100% of its federally-assisted highway construction funds for award to racial and ethnic groups and women, without first ascertaining the nature and scope of the past discrimination sought to be remedied by Congress and with no knowledge of any past discrimination in its own jurisdiction, conflict with the Fourteenth Amendment and this Court's prior decisions?

## List of Parties

**Petitioners**

Michigan Road Builders Association, Inc.
Ajax Paving Industries
Argersinger-Morse Construction Co.
Bacco Construction Co.
Basile Sons, Inc., Peter A.
Bolen Asphalt Paving, Inc.
Cadillac Asphalt Paving Co.
Doan Construction Co.
Forsberg, Inc., T.A.
Hull Company, Inc., C.A.
Interstate Highway Construction, Inc.
Kelcris Corporation
MacLean Construction Co.
Midwest Bridge Co.
Milbocker and Sons, Inc.
Molesworth Contracting Co.
J. Slagter & Son Construction Co.
Spartan Sign, Inc.
Walter Toebe Construction Co.
Ward and Van Nuck, Inc.

**Respondents**

The Director of the Michigan Department of Transportation,
in his official capacity;
The Members of the Michigan Transportation Commission,
in their official capacities.

## List Of Parties To Proceedings Below (including Rule 29.1 Statement Regarding Related Corporations)

**Plaintiffs/Appellants**

The Petitioners named in the above "List of Parties" were all plaintiffs/appellants in the proceedings below; none have been omitted.

Also, none of the Petitioners has any parent companies or publicly owned subsidiaries.

**Defendants/Appellees**

In addition to the Respondents named in the above "List of Parties," the Governor of the State of Michigan, the Michigan Department of Transportation, and the members of the Michigan State Transportation Commission, in their individual capacities, were all parties to the proceedings below. All parties not identified as Respondents in the above "List of Parties" have been omitted as parties to this Petition and have been so notified pursuant to Rule 12.4 and Rule 29 of the Rules of this Court.

## Table of Contents


Page

Questions Presented . . . . . i

List of Parties . . . . . ii

Index of Authorities . . . . . vi

Opinions Below . . . . . 2

Jurisdictional Statement . . . . . 2

Constitutional Provisions and Statutes . . . . . 2

Statement of the Case . . . . . 4

Reasons for Granting the Writ . . . . . 8

I. Summary of Argument . . . . . 8

II. The Test For Art. III Standing Adopted By The District Court Is Contrary To Prior Decisions Of This Court And Conflicts With Decisions Of Other Circuit And District Courts. . . . . 11

A. The Certification Requirement . . . . . 13

B. The Bid Submission Requirement . . . . . 13

C. The Requirement Of Identification Of A Specific Contract Which Petitioner Would Have Been Awarded . . . . . 15

III. Construing STURAA To Require Respondents To Adopt A Goal Based On DBE Availability, Without Reference To Findings Of Past Discrimination, Eliminates The Constitutional Requirement That STURAA And Respondents' Program Be Narrowly Tailored To Remediate Past Discrimination. . . . . 18

IV. Conclusion . . . . . 25

Appendix

## Index of Authorities

### Cases

*Adarand Constructors, Inc. v. Skinner*,
790 F.Supp. 240 (D.Colo. 1992) . . . . . 10

*Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1670 (1992) . . . . 17

*Carpenter v. Barnhart*,
894 F.2d 401 (4th Cir. 1990) . . . . . 18

*CC Distributors, Inc. v. United States*, 883 F.2d 146
(D.C. Cir. 1989) . . . . . 17

*Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988),
*cert. denied*, 493 U.S. 822 (1989); . . . . . 11

*City of Richmond v. J.A. Croson Co.*,
488 U.S. 469 (1989) . . . . . 10, 11, 24

*Coral Const'r. Co. v. King County*,
941 F.2d 910 (9th Cir. 1991) . . . . . 17

*Dayton Bd. of Education v. Brinkman*,
433 U.S. 406 (1977) . . . . . 21

*DKT Memorial Fund v. Agency for Int'l Development*, 810 F.2d 1236 (D.C.Cir. 1987) . . . . . 17

*Firestone Tire and Rubber Co. v. Risjord*,
449 U.S. 368 (1981) . . . . . 11

*Fullilove v. Klutznick*,
448 U.S. 448 (1980) . . . . . 8, 10, 11, 18-22

*H.K. Porter Co. v. Metropolitan Dade County*,
975 F.2d 762 (11th Cir. 1992) . . . . . 10, 22

*Int'l. Brotherhood of Teamsters v. U.S.*,
431 U.S. 324 (1977) . . . . . 13, 14

*Knickerbocker Ice Co. v. Stewart*,
253 U.S. 149 (1919) . . . . . 21

*Michigan Road Builders Association v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 109 S.Ct. 1333 (1989) . . . . . 4, 19

*Milliken v. Bradley*,
433 U.S. 267 (1977) . . . . . 21

*N.L.R.B. v. Catholic Bishop of Chicago*,
440 U.S. 490 (1978) . . . . . 9, 21

*Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville*, 951 F.2d 1217 (11th Cir. 1992); *cert. granted*, 113 S.Ct. 50 (1992) . . . . . 10, 17

*O'Donnell Const'r. Co. v. District of Columbia*, 762 F. Supp 354 (D.D.C. 1991), *rev'd on other grounds*, 963 F.2d 420 (D.C. Cir. 1992) . . . . . 17

*Personnel Adm'r. of Massachusetts v. Feeney*,
442 U.S. 256 (1970) . . . . . 18

*Regents of University of California v. Bakke*,
438 U.S. 265 (1978) . . . . . 15, 16

*Swann v. Charlotte-Mechlenburg Bd. of Education*, 402 U.S. 1 (1971), *reh'g denied*, 403 U.S. 912 (1971) . . . . . 21

*Valley Forge Christian College v. American United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982) . . . . . 11

*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) . . . . . 16

*West Virginia Ass'n of Community Health Centers, Inc. v.Heckler*, 734 F.2d 1570 (D.C.Cir. 1984) . . . . . 16

**Statutes**

28 U.S.C. §1254(1) . . . . . 2

28 U.S.C. §1331 . . . . . 2

28 U.S.C. §1343 . . . . . 2

42 U.S.C. §1983 . . . . . 2

*Surface Transportation and Uniform Relocation Assistance Act of 1987*, Pub.L. 100-17, §106(c), 101 Stat. 132, 145 . . . . . 3, 6

**Other**

49 C.F.R. §23.45(g)(5) . . . . . 6, 7, 22, 23

49 C.F.R. §23.66(a) . . . . . 23

*House Conference Report No. 27, 100th Cong.*, 1st Session 148, (1987), *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat) at 123 . . . . . 23

*Michigan State Transportation Commission Policy; Federal DBE/MBE/WBE and State HBO Program Commitment* . . . . . 3

Senate Report (Environment and Public Works Committee) No. 4, 100th Cong., 1st Session 12, (1987), *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat) at 76 . . . . . 23

*U.S. Const., Amend. XIV, Sec. 1* . . . . . 2

# In the
# Supreme Court of the United States

October Term 1992

---

Michigan Road Builders Association, Inc., et al.,

*Petitioners,*

v.

The Director of the Michigan Department of Transportation,
in his official capacity, et al.,

*Respondents.*

---

## Petition For Writ Of Certiorari
## To The United States Court of Appeals
## For the Sixth Circuit

---

The Petitioners, Michigan Road Builders Association, Inc., et. al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on November 19, 1992.

## Opinions Below

The Sixth Circuit's Opinion was not released for publication but is reproduced in full in the Appendix to this Petition at App. 1a. The District Court's Opinion is reported at 761 F.Supp. 1303 (W.D.Mich 1991) and is reproduced in full, together with the District Court's Judgment, in the appendix to this Petition beginning at App. 2a.

## Jurisdictional Statement

Petitioner brought this action in the United States District Court for the Western District of Michigan alleging violations of, *inter alia*, 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. The District Court had jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343. The Sixth Circuit Court of Appeals obtained jurisdiction pursuant to 28 U.S.C. §1291 and entered its Judgment on November 19, 1992. *See* Opinion, at App. 1.

Petitioner timely filed this Petition for Writ of Certiorari in accordance with Rule 13 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## Constitutional Provisions and Statutes

U.S. Const., Amend. XIV, Sec. 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983, Civil Action for Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected

> any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub.L. 100-17, §106(c), 101 Stat. 132, 145:

> Except to the extent the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under titles I and III of this Act or obligated under titles I, II, and III (other than section 203) of the Surface Transportation Assistance Act of 1982 after the date of the enactment of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

49 C.F.R. §23.1 et. seq.:

> The Regulations are lengthy, and, pursuant to Rule 14 of the Rules of this Court, the sections involved in this case are reproduced in full in the appendix to this Petition at App. 36a.

Michigan State Transportation Commission Policy; Federal DBE/MBE/WBE and State HBO Program Commitment:

> The Commission Policy is lengthy and, pursuant to Rule 14 of the Rules of this Court, is reproduced in full in the appendix to this Petition at App. 26a.

## Statement of the Case

This action was commenced on May 8, 1990 by the Michigan Road Builders Association, Inc. (hereinafter "MRBA") seeking declaratory relief and an injunction against the continued enforcement of policies adopted by the Michigan State Transportation Commission (hereinafter the "Commission") which excluded 95% of MRBA's 120 members, who perform 75% of the total dollar value of all state highway construction contracts, from bidding on selected highway construction contracts let by the Michigan Department of Transportation (hereinafter "MDOT") because of the members' race, ethnic origin, and gender.

Specifically, the Commission adopted a policy requiring that fifteen percent (15%) of the dollar amount of all federal-aid highway funds awarded or administered by MDOT must be expended with disadvantaged business enterprises (DBE's), minority business enterprises (MBE's), women business enterprises (WBE's), and handicapped-owned businesses (HBO's)[1]. A "disadvantaged business enterprise" is a business which is at least 51% owned, managed and controlled by women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Asian-Indian Americans, and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act. Individuals in the above racial and ethnic groups are presumed to be economically and socially disadvantaged under the Commission's policy.

The Commission also mandated the use of a set-aside technique which limited consideration of bids or proposals to those submitted by DBE/MBE/WBE/HBO firms. The policy sets forth the reasons for adoption of the set-aside technique:

[1] The Commission first adopted a 15% goal on February 24, 1988, *See* Commission Minutes, App. 23a., which was the day following denial of a Motion for Rehearing and Rehearing En Banc by the Sixth Circuit Court of Appeals in *Michigan Road Builders Association v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989), wherein a Michigan statute setting aside 7% of the State's discretionary expenditures for MBE's and 5% for WBE's was declared unconstitutional because the State had presented no evidence of prior discrimination in the highway construction industry in Michigan.

> Recognizing the department's commitment to DBEs/MBEs/WBEs/HBOs and recognizing that inequities have limited DBEs/MBEs/WBEs/HBOs in their ability to obtain adequate working capital, bonding and prerequisite experience necessary to be competitive, **a set-aside technique will be used by the department**. The set-aside technique, included in the regular lettings, will be used to meet the overall goals and to provide construction services and procurement opportunities for DBEs/MBEs/WBEs/HBOs. Participation in set-aside contracts will provide firms the opportunity to gain experience in the transportation industry.[2]

After receiving complaints from its members that they were being excluded from bidding on MDOT contracts because of the policy, the MRBA Board of Directors authorized the employment of counsel to challenge the discriminatory bidding practice.

On May 18, 1990, MRBA sought to restrain MDOT from using the set-aside technique for biddings scheduled to occur on May 23, June 6, and June 20, 1990. The district court denied the Motion on May 21, 1990, which decision was embodied in an Order dated June 14, 1990.

On August 15, 1990, an Amended Complaint was filed which, *inter alia*, added several individual contractor members of MRBA as Plaintiffs and added the named Commission members as Defendants. The Complaint was again amended on September 14, 1990 to encompass the Commission's new 15% goal for the coming fiscal year.[3]

A bench trial was held on November 7 and 8, 1990, and, after final arguments on December 20, 1990 and the submission of post-trial Briefs, the district court issued its Opinion and Judgment on April 11, 1991.

[2] *See* copy of Policy, App. 26a (emphasis added). Note that the policy has no waiver provisions; neither the amount of goal nor the identification of which contracts are to be set-aside can be questioned.

[3] *See* Office Memorandum recommending adoption of 1991 Goal, App. 28a.

In its Opinion, the court first dismissed the Commission and MDOT on 11th Amendment grounds but held that MDOT's Director and the Commission members were proper parties for prospective injunctive relief in their official capacities. The court dismissed the Governor on the basis of the court's finding that he played no role in establishing the Commission's use of set-asides or minority participation goals.

The court then held that neither MRBA nor any of the individual contractors had standing to maintain the action. The court stated three reasons to support its decision that Petitioners lacked standing: (1) it was not shown that any individual contractor had sought to be certified as a disadvantaged business enterprise and been denied certification; (2) there was no evidence that any contractor had attempted to submit a bid which was actually refused by MDOT; and (3) no contractor had proven that it would have been the successful bidder on any particular contract. The court thus found that Petitioners had failed to demonstrate a concrete injury in fact sufficient to give them Article III standing to challenge Respondents' policy.[4]

Notwithstanding its holding that Petitioners lacked Article III standing, the district court went on to determine the case on the merits. The court held that the Commission was authorized by Congress pursuant to the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"), Pub.L. 100-17, §106(c), 101 Stat. 132, 145 to adopt an unlimited goal for the preferred classes and to use the set-aside technique to assure attainment of whatever goal it chose. The district court held that the Federal Regulations, 49 C.F.R. §23.45(g)(5), mandated the procedure for determining the appropriate goal under STURAA and found that Respondents had properly based their overall goal exceeding 10% on the following factors from the Regulations:

1. a projection of the number and types of contracts to be awarded by the applicant and a projection of the number and types of MBE's likely to be available to compete for contracts

[4] Note that the court also found that the MRBA lacked organizational standing to bring the suit, but the court's decision in this regard rested primarily on its finding that no individual members had demonstrated a concrete injury in fact which would entitle them to sue in their own right.

from the recipient over the period during which the goals will be in effect; and

2. past results of the applicant's/recipient's efforts to contract with MBE's and the reasons for the high or low level of those results.[5]

The Respondents admitted that they knew of no prior discrimination in the highway construction industry in Michigan, admitted that they had not sought to determine the nature or scope of the past discrimination found by Congress as a basis for §106(c), and admitted that they had made no attempt to tailor the amount of their goal to the remediation of any identified past discrimination. The district court held that Respondents were not required to consider the relation of their selected goal to past discrimination and that they had properly determined their goal based solely on the factors set forth in 49 C.F.R. 23.45(g)(5). The court rejected Petitioners' argument that 49 C.F.R. 23.45(g)(5) could not constitutionally be construed to permit, let alone mandate, the establishment of a goal which was beyond the 10% expressly determined by Congress and which bore no relation to remedying prior discrimination.

On appeal, the Sixth Circuit Court of Appeals affirmed the district court's judgment against Petitioners, adopting the district court's decision of the case on the merits as the basis for its decision to affirm the judgment. App. at 1-2. The Sixth Circuit stated that:

> While the panel differs with some of the conclusions of the district court concerning lack of standing, we nevertheless agree with the court's reasoning concerning the merits of the claims brought by plaintiffs, and therefore adopt that reasoning as set out by the court in its opinion of April 11, 1991. Under the circumstances of this case, resolution of the appeal is governed by the Supreme Court's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), rather than by the opinion released in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[5] Note that 49 C.F.R. §23.45(g)(5) does not use the term "DBE," as used in STURAA, but instead uses the term "MBE".

## Reasons for Granting the Writ

### I. Summary of Argument

The decision on the merits in this case announces a radical change in the requirements established by this Court for the constitutionally permissible use of racial classifications by the government. Under the lower court's construction of STURAA and the Federal Regulations, as adopted by the Sixth Circuit, states are required by Congress to adopt racial, ethnic, and gender-based preference plans based solely on the availability of preferred class members to perform the number of contracts available. No longer is it necessary for states to consider whether their use of racial or ethnic classifications is narrowly tailored to the objective of remedying the present effects of prior discrimination; all that is necessary now is for states to show that their programs are derived from STURAA, and they are then free to adopt whatever minority participation goal they derive by looking solely to the number and availability of minority contractors in their state. Respondents testified that, under this analysis, if enough DBEs are available to perform all state highway construction contracts, all non-DBEs are required to be excluded.

The lower courts in this case justify their departure from the constitutional standard requiring narrow tailoring of racially based remedial measures by purporting to follow the very case from this Court which reaffirmed the necessity for narrow tailoring - *Fullilove v. Klutznick*, 448 U.S. 448 (1980). They point to the language of STURAA, which provides that not less than 10% of the funds appropriated by Congress thereunder shall be expended with DBE's, and hold that Congress authorized the states to adopt any DBE participation goal in excess of 10% which the states find to be possible based on the availability of DBE contractors and their prior levels of participation. Such an unlimited authorization by Congress to the states, they hold, is permissible under this Court's opinion in *Fullilove*.

However, neither STURAA nor the Federal Regulations may constitutionally be construed to grant such unfettered power to states to adopt minority preference programs which are not narrowly tailored to remedying specifically identified prior discrimination. While Congress has broad powers to engage in affirmative action without making specific

findings of prior discrimination, the means chosen by Congress must still be narrowly tailored to remedying the discrimination it found. Under the lower courts' interpretation of STURAA and the Federal Regulations in this case, the necessity for narrow tailoring has been abrogated; Congress has delegated to the states the power to make the critical determination of what preference goal to chose, based solely on the availability of minority contractors, and has done nothing to ensure that the goals selected by the states will be narrowly tailored to remedying the discrimination Congress found.

This interpretation would render STURAA itself unconstitutional and should not be permitted, particularly under the guise of following this Court's precedent. Since courts are bound to construe Congressional action to be constitutional if at all possible, *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1978), STURAA must be construed to provide a Congressional mandate for state enacted preferences of only 10%; any goal in excess of 10% must be supported by independent state justification that such a goal is necessary to remedy identified prior discrimination.

The urgency of the problem becomes apparent when one considers the severity of the burden being placed on non-minority contractors by the erroneous interpretation given to STURAA and the Federal Regulations. Congress recently authorized expenditures of 153 Billion dollars over the next six years under the Intermodal Surface Transportation Efficiency Act of 1991, Pub.L. 102-240, 105 Stat. 1918-1919 (the re-authorization of STURAA) and again provided that 10% of this money is to be set aside for DBE contractors (Congress explicitly rejected a proposal to raise the 10% figure). Under the interpretation of STURAA complained of herein, non-minority contractors are being excluded from millions of dollars of work beyond the level Congress specified as necessary to remedy prior discrimination. While some burden on innocent third-parties is justifiable in the interest of remedying the present effects of prior discrimination, the burden should not be increased simply because states have determined that a sufficient number of qualified minority contractors exist in their state to support an increased goal. This Court should not delay deciding the issues involved herein but should accept review of this case, which clearly frames the

issues,[6] and should indicate to states and to the lower federal courts that construing STURAA to mandate unlimited goals based on the availability of minority contractors is a misinterpretation of STURAA and this Court's precedents and that such a construction sanctions discrimination for its own sake, which the Constitution forbids.

It must also be pointed out that, although the Sixth Circuit's opinion constituted a decision on the merits, as evidenced by the court's adoption of the district court's substantive reasoning and its statement that the resolution of the appeal was governed by *Fullilove* and not by *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), thus impliedly reversing the district court's conclusion that Petitioner's lacked standing, the Sixth Circuit's opinion does not expressly reverse the district court's standing decision and in fact affirms the judgment as a whole. Because of the possible confusion engendered by the Sixth Circuit's summary affirmance, and because of the novel requirements for Art. III standing announced by the district court, the standing issue is of equal importance for this court's review.

The test for Art. III standing utilized by the district court in this case, whereby plaintiffs were (1) required to engage in the futile gesture of seeking DBE certification for which they were not qualified; (2) required to engage in the similarly futile gesture of submitting bids for contracts reserved exclusively for DBE's; and (3) required to point to a specific contract which they would have received had they submitted a bid, conflicts with decisions of this Court and with the decisions of other federal circuit and district courts holding that the mere denial of the opportunity to compete for benefits is sufficient to establish standing. Under the stringent standard announced by the district court in this case, an aggrieved non-minority contractor could rarely acquire standing to challenge racial preference programs. This Court recently accepted a similar case for review from the Eleventh Circuit to decide whether plaintiffs seeking to challenge a racial preference program must show the loss of a specific contract to obtain standing, *Northeastern Florida*

[6] Note that the analysis of the case on the merits contained in the district court's published opinion has already been cited as authority by other federal courts. *H.K. Porter Co. v. Metropolitan Dade County*, 975 F.2d 762, 765, 769 (11th Cir. 1992); *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp. 240, 243, 244 (D.Colo. 1992).

*Chapter of the Associated General Contractors of America v. Jacksonville*, 951 F.2d 1217 (11th Cir. 1992); *cert. granted*, 113 S.Ct. 50 (1992), and accepting review of the instant Petition would enable this Court to consider the standing question in a more comprehensive manner, thus facilitating the issuance of a more definitive standing test to guide the lower courts.

## II. The Test For Art. III Standing Adopted By The District Court Is Contrary To Prior Decisions Of This Court And Conflicts With Decisions Of Other Circuit And District Courts.

As mentioned above, the Sixth Circuit's opinion affirming the district court's judgment was a decision on the merits as clearly indicated by its adoption of the district court's substantive reasoning and its statement that resolution of the appeal was governed by this Court's opinion in *Fullilove* and not by the Court's decision in *Croson*. Since federal courts are not constitutionally permitted to decide issues on the merits once it is found that standing is lacking, *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988), *cert. denied*, 493 U.S. 822 (1989); *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981), the Sixth Circuit necessarily must have found that Petitioners had shown the requisite standing to enable them to challenge Respondents' program on the merits. However, since the Sixth Circuit did not expressly reverse the district court's standing decision, standing remains an issue in this case which should be reviewed by this Court

In *Valley Forge Christian College v. American United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982)(citations omitted), this Court set forth the minimum requirements to satisfy Art. III standing:

> Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' ... and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'

Respondents' policy "limits bids or proposals [on set-aside contracts] to those submitted by DBE/MBE/WBE/HBO firms." The owner of Petitioner Spartan Sign Company testified that the company fabricated and erected highway traffic control signs and performed pavement marking. He identified three MDOT contract advertisements that Spartan Sign Company was capable of performing but was precluded by Respondents' policy from even bidding on because the identified contracts were set aside for letting to only DBE/MBE/WBE/HBO firms. Spartan Sign was not a certified DBE/MBE/WBE/HBO firm.

Despite these facts showing that Petitioner Spartan Sign had been denied the opportunity to compete by Respondents' policy, the district court found that Petitioners had failed to show that they had suffered a concrete injury in fact. It accordingly ruled that Petitioners lacked Art. III standing.[7]

Although well-settled law from this Court and from numerous other federal circuit and district courts indicates that the mere denial of the opportunity to compete is a sufficient injury in fact to confer Art. III standing, see *infra* at 15-17, the district court in this case went much further and imposed three additional standing requirements. Under the district court's analysis, aggrieved plaintiffs seeking to challenge a state minority preference program must show: (1) that they had sought to be certified as a DBE but had been denied certification; (2) that they had attempted to submit a bid which was actually refused by defendants; and (3) that they would have been awarded the contract had their bid been considered. None of these requirements are contained in any existing

[7] As noted above, the district court also ruled that MRBA lacked organizational standing. The primary basis for this decision, that no individual member demonstrated a concrete injury in fact, is erroneous since at least one member, Spartan Sign, demonstrated a sufficient injury. The other basis, that not *all* MRBA members were non-DBE's, is, however, similarly without merit and conflicts with decisions of this Court and other federal circuit courts. See *Associated General Contractors, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1408-1409 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1670 (1992)(citing *UAW v. Brock*, 477 U.S. 274, 288-289 (1986) as support for the holding that unanimity among association members is not necessary to establish associational standing). Thus, the MRBA should be found to have associational standing to bring this suit together with the individually named member contractors.

precedent, and each should be rejected by this Court as prerequisites to establish Art. III standing.

### A. The Certification Requirement

Under Respondents' policy, Blacks, Hispanics, Aleuts, Asian-Pacific Americans and women, among others, enjoy a presumption of disadvantaged status based solely on their race, national origin, and gender. Respondents' policy thus discriminates against Petitioners on its face. Petitioners are denied the presumptive certification provided to the designated minority groups on the basis of race, ethnicity, and gender, and Petitioners should have Art. III standing to challenge the very certification procedure which the district court holds necessary to attain Art. III standing.

Moreover, given Petitioners' knowledge that they did not meet the requirements for certification as DBE firms, the district court's standing test requires Petitioners' to engage in a futile gesture to obtain standing. However, this Court does not require parties to engage in futile gestures to establish redressable injuries. *See, Int'l. Brotherhood of Teamsters v. U.S.*, 431 U.S. 324 (1977)(quoted herein in the section immediately below). Indeed, an application for certification as a DBE by a firm with knowledge that it does not meet the requirements for DBE status might be considered an attempt to wrongfully receive certification and subject the applicant to severe penalties. Thus, petitioners should not have been required to seek certification as DBE's and been rejected to obtain standing.

### B. The Bid Submission Requirement

The district court's next requirement for Art. III standing - that Petitioner Spartan Sign Company was required to submit a bid on a contract set aside for preferred contractors only and have its bid rejected - again requires Petitioner to engage in a futile exercise. Respondents' policy ordains that bids from non-DBE contractors will not be considered by MDOT on set-aside contracts. Petitioners would have to assume that MDOT, which has identified the contracts to be set aside for DBEs, would then abandon further enforcement of the Commission policy and

consider Petitioners' bids. The expectation that MDOT, which must follow Commission policy, will abandon its enforcement scheme in midstream is not reasonable.

This Court addressed the requirement that a person must subject himself to in fact application of a racially discriminatory policy in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The Court stated:

> the company's assertion that a person who has not actually applied for a job can **never** be awarded seniority relief cannot prevail. The effects of and the injuries suffered from discriminatory employment practices are not always confined to those who were expressly denied a requested employment opportunity. **A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection.**
>
> If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices -- by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, an even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups. **When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application.**

*Id.* at 365-366 (emphasis added).

MDOT's consistent enforcement of the State's prior set-aside statute[8] gave conclusive proof to Petitioner that the Commission's current set-aside policy would be adhered to. Failure to submit a bid to an agency duly bound **not** to consider it is a futile gesture and ought not to be required to obtain standing to challenge the constitutionality of the underlying racial, ethnic, and gender-based policy.

### C. The Requirement Of Identification Of A Specific Contract Which Petitioner Would Have Been Awarded

The final element required by the District Court for Art. III standing was proof that Petitioner would have been awarded a specific contract but for the alleged racial, ethnic or gender-based discrimination.[9]

While it is true that Petitioners' ultimate goal is the receipt of an MDOT contract, it is not true that non-receipt of the contract comprises the injury Petitioner has suffered by the Commission's policy. Petitioners' injury is its inability to compete for MDOT set-aside contracts because of race, ethnic origin, and gender. There is no guarantee that MDOT will award a contract let for bidding whether it is a set-aside contract or not. In some cases, MDOT may reject all bids and re-bid the contract.

In this respect, this case is like *Regents of University of California v. Bakke*, 438 U.S. 265 (1978). In that case, the Medical School of the University of California at Davis reserved 16 of the 100 entering medical class positions for disadvantaged applicants. *Bakke* sought admission to the school and was denied. He brought an action alleging that the school's policy which excluded him from competing for all 100 places because of his race violated the Fourteenth Amendment. In holding that *Bakke* had Art. III standing, this Court said:

[8] See *Michigan Road Builders v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989).

[9] This issue is presently pending before this Court in the case of *Northeastern Florida Chapter v. Jacksonville*, 951 F.2d 1217 (11th Cir. 1992), *cert. granted*, 113 S.Ct. 50 (1992).

> even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of an injury to himself that is likely to be redressed by favorable decision of his claim. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence, the constitutional requirements of Art III were met. The question of Bakke's admission **vel non** is merely one of relief.

*Id.* at 280-281, n.14. *See also Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

The only purpose for Respondents' set aside policy in this case is to preclude competition from non DBE/MBE/WBE/HBO firms in order to ensure that the contracts will be awarded to DBE/MBE/WBE/HBO firms. Just as *Bakke* had Art. III standing to challenge the Regents' set-aside policy without proof that he would have ultimately been admitted, so ought Spartan Sign Company have standing to challenge the Commission's set-aside policy without proof that it would have ultimately been awarded the set-aside contracts.

In addition to its conflict with this Court's decisions in *Bakke* and *Village of Arlington Heights*, the district court's standing analysis conflicts with other federal circuit and district court decisions. For example, the District of Columbia Circuit has consistently held that the denial of an opportunity to compete for a benefit establishes Art III standing without proof that the benefit would actually be received. In *West Virginia Ass'n of Community Health Centers, Inc. v. Heckler*, 734 F.2d 1570 (D.C.Cir. 1984), that court held:

> appellants argue that they have been injured by being denied an opportunity to compete for increased funding, and that to have standing they need not demonstrate that they would actually receive the additional funding. Our examination of applicable law mandates the conclusion that appellants do indeed have standing to sue.

*Id.* at 1574. *See also O'Donnell Const'r. Co. v. District of Columbia*, 762 F. Supp 354, 362 (D.D.C. 1991), *rev'd on other grounds*, 963 F.2d 420 (D.C. Cir. 1992) (lost opportunity to bid on contracts reserved for MBE's sufficient to establish standing); *CC Distributors, Inc. v. United States*, 883 F.2d 146, 150 (D.C. Cir. 1989)(lack of opportunity to compete for benefit sufficient to confer standing); *DKT Memorial Fund v. Agency for Int'l Development*, 810 F.2d 1236, 1238 (D.C.Cir. 1987)(same).

The Ninth Circuit reached a similar conclusion in *Associated General Contractors of California v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1670 (1992), stating that:

> [t]he mere fact that AGCC members cannot play on an even field against MBEs subjects them to a legally cognizable injury.

*Id.* at 1407. *See also Coral Const'r. Co. v. King County*, 941 F.2d 910, 929-930 (9th Cir. 1991).

Finally, the district court for the District of Connecticut considered a case with facts very similar to those presented in the instant case in *Associated General Contractors v. New Haven*, 130 F.R.D. 4, 7-8 (D.Conn. 1990), and concluded that the denial of the opportunity to compete created by a set-aside program was sufficient to confer standing to challenge the program. The court stated:

> the set-aside ordinance deprives AGC's white male subcontractor and supplier members of the opportunity to compete for a percentage of the contracts awarded by defendant. Such a deprivation constitutes an injury in fact and vests those members with standing to sue in their own right.

*Id.* at 8.

Although decisions from the Eleventh and Fourth Circuits conflict with the holdings discussed above, see *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*, 951 F.2d 1217 (11th Cir.

1992), *cert. granted*, 113 S.Ct. 50 (1992); *Carpenter v. Barnhart*, 894 F.2d 401 (4th Cir. 1990)(TABLE)(text in slip op. No. 88-3578 and 1990 U.S.App. LEXIS 510), that is all the more reason for this Court to grant review of this case. Parties in federal courts should not be subjected to differing standing requirements, particularly those based on the Constitution, and this Court should grant the instant Petition to resolve the differences between the Sixth, Fourth and Eleventh Circuits and the District of Columbia and Ninth Circuits and the District of Connecticut.

## III. Construing STURAA To Require Respondents To Adopt A Goal Based On DBE Availability, Without Reference To Findings Of Past Discrimination, Eliminates The Constitutional Requirement That STURAA And Respondents' Program Be Narrowly Tailored To Remediate Past Discrimination.

The decisions complained of herein announce a radical change in the permissible scope of affirmative action programs. Never before has a federal affirmative action plan been construed to permit, let alone mandate, the exclusion of all non-minority persons from governmental benefits as a means of remedying prior discrimination. Under the decision in this case, DBE's are entitled to all Federal-aid highway construction contracts provided they are available and capable of performing the work.

Respondents, the district court, and the Court of Appeals all professed reliance on *Fullilove v. Klutznick*, 448 U.S. 448 (1980) as requiring this unprecedented decision. Yet, while relying on *Fullilove*, none of them applied its teachings in reaching their decisions. *Fullilove* should not be applied blindly to insulate discriminatory state preference programs from Constitutional challenge simply because the state programs purport to rely upon federal authorization.

As this Court has repeatedly held, classifications based on racial and ethnic criteria are "presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1970). "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove*, *supra*, 448 U.S. at 491.

The instant case arose out of a challenge by Petitioners to a Commission policy which preferred DBE/MBE/WBE/HBO contractors over non-DBE/MBE/WBE/HBO contractors. Respondents admitted that they had no evidence of prior racial or ethnic discrimination against highway construction contractors in Michigan. Indeed, from 1980 to 1989 Respondents had been discriminating against non-minorities in favor of minorities. *Michigan Road Builders Ass'n v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989). Having no independent justification for their policy granting preferences on the basis of race, ethnicity, and gender, Respondents asserted that they relied "solely on Federal law" as authority for their policy. The Federal law relied upon was STURAA and the Federal Regulations.

Thus, the task before the district court was to determine if STURAA and the Regulations mandated Respondent's actions. *Fullilove* teaches that the evaluation of race conscious programs is a two step process:

> [First, the court] must inquire whether the objectives of [the] legislation are within the power of Congress. [Second, the court] must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives and does not violate the [guarantees of equal protection contained in the Constitution.]

*Fullilove*, *supra*, 448 U.S. at 473.

Petitioners stipulated that the objective of remedying past discrimination was within the power of Congress and that STURAA required states to set a 10% goal for DBE participation. Petitioners challenged Respondent's construction of STURAA which would require the setting aside of an unlimited percentage of highway construction contracts for DBE/MBE/WBE/HBO firms.[10]

[10] Respondents' policy established a 15% goal, which was 5% over the federal mandate, and utilized set-asides to ensure attainment of that goal. However, under Respondents' and the lower courts' analysis of STURAA and the Regulations, whereby the goal must be set based on the availability of qualified

(continued...)

The issue before this Court is whether Respondents' and the lower courts' construction of STURAA and the Federal Regulations can be considered a narrowly tailored means employed by Congress to achieve its objective, or whether STURAA and the Federal Regulations should be construed to mandate a preference goal of just 10%.

The requirement of STURAA is straightforward:

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

The disputed construction is over whether "not less than 10%" means anything between 10% and 100%, limited only by the availability of sufficient DBE firms to perform the contracts.

*Fullilove* provides a good starting point for this analysis. The requirement under review in *Fullilove* was the expenditure of "at least 10 per centum" of the funds with minority business enterprises. There is not a hint that any Justice considered this language to authorize, let alone mandate, states to expend more than 10% of the funds with MBE's. The provision is referred to as "the statutory 10% target," 448 U.S. at 488 (Burger, C. J.) and the 10% requirement, *id.* at 499 (Powell, J. concurring), and "the percentage chosen for the set-aside." *Id.* at 313 (Powell, J. concurring). This point is expressed most clearly by Justice Stevens' dissenting opinion: "[n]or does the Act or its history explain why 10% of the total appropriation was the proper amount to set aside for investors in each of the six racial subclasses." *Fullilove*, *supra*, 448 U.S. at 535-36. Thus, this Court construed the "at least 10%" language of the statute to require a 10% goal - period.

[10](...continued)

> minority contractors to perform the available work, the goal would reach 100% if enough qualified minority contractors were available. Respondents admitted that this result was mandated under their construction of the law. Respondents' construction of the law was adopted by the district court which, in turn, was adopted by the Sixth Circuit.

However, when construing the "not less than 10%" language of STURAA, which plainly means the same as "at least 10%," the courts herein construed the language as open ended and requiring an unlimited set-aside. As illustrated below, this construction of STURAA renders STURAA itself unconstitutional and should not be permitted. See *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1978)("an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available").

The only justification for the lower courts' approval of Respondents' set-aside program in this case is their finding that Congress delegated to Respondents the authority to select the goal, limited only by DBE availability. The concept that Congress may delegate such authority is simply wrong. Congress alone has been charged by the Constitution with the unique power of legislating to enforce the provisions of the Fourteenth Amendment. *Fullilove*, *supra*, 448 U.S. at 580 (Powell, J., concurring). Unique powers of Congress are not delegable, *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1919), and Congress cannot constitutionally be found to have delegated its legislative power of setting a goal to remedy the discrimination it found.

When exercising its power to enforce the Fourteenth Amendment, Congress must "proceed only with programs narrowly tailored to achieve its objective, subject to continuing evaluation and reassessment." *Fullilove*, *supra*, 448 U.S. at 490. The construction adopted by the Sixth Circuit in this case makes it impossible for the courts, or even Congress itself, to determine whether the means chosen to achieve Congress' objective are narrowly tailored to the purpose sought to be accomplished by Congress. Under the Sixth Circuit's construction, the means used to accomplish Congress' objective are to be determined by Respondents alone, without regard to any findings of past discrimination.

This Court has often held that, where Federal Courts seek to fashion a remedy for Constitutional violations, the scope of the remedy is determined by the nature of the violation. *Dayton Bd. of Education v. Brinkman*, 433 U.S. 406, 419-20 (1977); *Swann v. Charlotte-Mechlenburg Bd. of Education*, 402 U.S. 1, 16 (1971), *reh'g denied*, 403 U.S. 912 (1971); *Milliken v. Bradley*, 433 U.S. 267, 280-281 (1977). In this case, Respondents admitted that they did not know what past discrimination had been found by Congress, nor did they have any

evidence of discrimination in Michigan. Petitioners submit that, without knowledge of the violation to be remedied, Respondents could not fashion a narrowly tailored remedy. *See H.K. Porter Co. v. Metropolitan Dade County*, 975 F.2d 762, 766 (11th Cir. 1992).

Respondents also point to the Federal Regulations as justification for their policy. However, the Regulation relied on by Respondents, 49 CFR § 23.45 (g)(5), should not be construed to mandate the procedure for adoption of set-aside goals under STURAA.

Initially, it must be noted that 49 C.F.R. §23.45 (g)(5) was adopted in 1980, seven years before the enactment of STURAA. It is doubtful that a supposed "implementing regulation" could be adopted years before the enactment of the statute it is intended to implement. Also, STURAA addresses the need to expend 10% of its funds with DBE's; the Regulation addresses MBE goals. If the Department of Transportation (DOT) intended this regulation to apply to setting goals under STURAA, it would be expected that DOT would have amended the regulation to apply to DBE's. This is particularly true since racial and ethnic classifications are involved, which classifications are "irrelevant to almost every governmental decision." *Fullilove*, *supra*, 448 U.S. at 496. Finally, when approving state submitted DBE set-aside goals, DOT automatically approves any goal of 10% or more. If the Regulations were meant to mandate a procedure for adoption of goals based on the availability of DBE contractors, which procedure will often result in goals in excess of 10% as it did here, DOT would not approve all goals of 10%.

More importantly, even if DOT intended §23.45(g)(5) to mandate the goal setting procedure for states receiving federal funds, §23.45(g)(5) cannot constitutionally be construed to allow the setting of goals above the 10% level established by Congress. The Department of Transportation is subject to the same Constitutional constraints in fashioning the Regulations as are Respondents in implementing their programs. Since DOT derives its authority to adopt the regulations only from Congress, STURAA and its legislative history must again be examined to determine whether Congress mandated DOT to require the adoption of unlimited set-aside goals based on DBE availability.

The Senate Report (Environment and Public Works Committee) No. 4, 100th Cong., 1st Session 12, (1987), *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat) at 76, states:

> Subsection (a) establishes a 10 percent goal and provides secretarial discretion in lowering the goal.

This certainly does not lend support to a construction of STURAA which provides Congressional mandate for a procedure which requires setting of goals in excess of 10%.

STURAA also changed the definition of DBE to include women owned businesses. Notwithstanding the inclusion of this very large class, the House Conference Report No. 27, 100th Cong., 1st Session 148, (1987), *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS (101 Stat) at 123, cautions the Secretary of Transportation as follows:

> In establishing regulations to implement this section, the Secretary should not increase the overall 10 percent DBE requirement set by this section as a result of the inclusion of WBE's as a presumptive group.

This language seems directly contrary to a construction that bases the setting of the set-aside goal on DBE availability in the individual states. The pool of available DBE's has been vastly increased, but Congress directs that the goal remain at 10%.

Reliance on §23.45 (g)(5) is further weakened by reference to §23.66(a) which provides:

> The Administrator reviews and approves any overall goal of ten percent or more submitted by a recipient and provided in § 23.45(g) of this part.

If Respondents were required to have a goal in excess of 10%, the Administrator would not approve "any goal of ten percent or more".

Finally, Respondents point to the statement in the House Conference Report, supra, providing:

> Some states may wish to establish a DBE goal which exceeds the minimum goal set by this section and they are permitted to do so.

However, consideration of this statement brings us right back to square one. Although states are permitted to establish a goal in excess of 10% if they **wish**, they are not **mandated** by Congress to do so. If Congress had wished to set a higher goal, **Congress** would have done so.

Since it is Respondents' wish, and not the mandate of Congress, to have a goal in excess of 10%, Respondents must have a compelling governmental interest to justify their increased goal. The only compelling governmental interest recognized by this Court to justify racial and ethnic preferences is the remediation of the present effects of past discrimination, *City of Richmond v. J.A. Croson Co.* , 488 U.S. 469 (1988). Since Respondents admit that they know of no past discrimination in the highway construction industry in Michigan and "rely solely on Federal law as authority" for their discriminatory program, which, as illustrated above, cannot constitutionally be construed to mandate a goal above the 10% specifically set by Congress, Respondents' set-aside goal in excess of 10% has no constitutionally permissible justification and is invalid.

Accordingly, the decisions below are not consistent with the Fourteenth Amendment's equal protection guarantee and are contrary to this Court's prior decisions.

## IV. Conclusion

The lower court's decision announces the death knell for the narrowly tailored requirement in race and ethnic preference programs. Such a radical departure from prior Supreme Court decisions should only be mandated by a decision of the Supreme Court.

Likewise, the establishment of onerous or impossible conditions required of a plaintiff to establish standing to challenge racial and ethnic discrimination merits the attention and evaluation of this Court.

The Writ of Certiorari should be granted.

*Respectfully submitted,*

John Bernard Weaver*
Daniel R.W. Rustmann
Susan Jezewski Evans
**Butzel Long**
150 West Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7000
**Attorneys for Petitioners**

February 15, 1993

*Counsel of Record

# APPENDIX

## Table of Contents of Appendix


| | | Page |
|---|---|---|
| 1. | Sixth Circuit Opinion and Judgment | 1a |
| 2. | District Court Judgment | 2a |
| 3. | District Court Opinion | 3a |
| 4. | Michigan State Transportation Commission Minutes, February 24, 1988 | 23a |
| 5. | Michigan State Transportation Commission Policy | 26a |
| 6. | August 16, 1990 Office Memorandum Recommending Adoption of 1991 Goal | 28a |
| 7. | 49 C.F.R. §23.1 et. seq. | 36a |

**Not Recommended For Publication**

**No. 91-1575**

**United States Court Of Appeals**
**For The Sixth Circuit**

**Michigan Road Builders Association, Inc., et al.**

Plaintiffs-Appellants,

**James J. Blanchard, et al.,**
Defendants-Appellees.

FILED
NOVEMBER 19, 1992
LEONARD GREEN, CLERK

**On Appeal From The United States District Court For The Western District Of Michigan.**

Before: **Boggs and Norris**, Circuit Judges,
**Contie**, Senior Circuit Judge.

**Per Curiam**. Plaintiffs appeal the judgment entered by the district court in favor of defendants, the court having found against plaintiffs on all their claims for declaratory and injunctive relief. Having had the benefit of oral argument, and having carefully considered the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in granting judgment to defendants.

As the reasons why judgment should be entered for defendants have been articulated by the district court, the issuance of a written opinion by this court would be duplicative and serve no useful purpose. While the panel differs with some of the conclusions of the district court concerning lack of standing, we nevertheless agree with the court's reasoning concerning the merits of the claims brought by plaintiffs, and therefore adopt that reasoning as set out by the court in its opinion of April 11, 1991. Under the circumstances of this case, resolution of the appeal is governed by the Supreme Court's opinion in Fullilove v. Klutznick, 448 U.S. 448(1980), rather than by the opinion released in City of Richmond v. J.A. Croson, 488 U.S. 469(1989).

The judgment of the district court, dated April 11, 1991, is **affirmed**.

**United States District Court**
**For The Western District of Michigan**
**Southern Division**

**Michigan Road Builders Association, Inc., et al.**
Plaintiffs-Appellants,

**Case No. 5:90-CV-37**

**James J. Blanchard, et al.,**
Defendants-Appellees.

## Judgment

This action having been tried to the court, and the court having filed its findings of fact and conclusions of law;

IT IS HEREBY ORDERED that defendants Department of Transportation of the State of Michigan and the Michigan State Transportation Commission are DISMISSED under the Eleventh Amendment;

IT IS FURTHER ORDERED that defendant James J. Blanchard is DISMISSED for plaintiffs' failure to state a claim against him;

IT IS FURTHER ORDERED AND ADJUDGED that, as to the remaining defendants, plaintiffs take nothing on their complaint for declaratory and injunctive relief and that judgment is entered on behalf of defendants on all claims.

/S/
Douglas W. Hillman
Senior Judge

Dated: April 11, 1991

**United States District Court**
**For The Western District of Michigan**
**Southern Division**

**Michigan Road Builders Association, Inc., et al.**
Plaintiffs-Appellants,

**Case No. 5:90-CV-37**

**James J. Blanchard, et al.,**
Defendants-Appellees.

## Opinion

In this action for declaratory and injunctive relief, plaintiffs claim that defendants have violated their constitutional rights by discriminating against them in awarding road construction projects. In granting contracts containing federal funds, the State of Michigan has set aside 1.32% of the dollars awarded for Disadvantaged Business Enterprises ("DBEs"). Plaintiffs contend that the state is unlawfully aiding women and minorities at the expense of white males.

Plaintiffs are the Michigan Road Builders Association, Inc. and a group of individual road contractors and subcontractors. Defendants are James J. Blanchard, Michigan's former governor; the Michigan Department of Transportation ("MDOT"); James J. Pitz, former Director of MDOT; the Michigan State Transportation Commission ("the Commission"); and the individual members of the Commission: William C. Marshall, Roger D. Young, Hannes Meyers, Jr., Stephen F. Adamini, Shirley E. Zeller, and Nansi I. Rowe.

For fiscal year 1991, MDOT established a goal that 15% of the total dollar amount of all construction contracts containing federal funds be awarded to DBEs. Of the total dollar amount awarded, approximately 1.32% was set-aside to be exclusively bid upon by, and thus awarded to, DBEs. Only woman- and minority owned businesses, plaintiffs assert, may qualify as DBEs. Plaintiffs maintain that members of its association are precluded from bidding on and being awarded set-aside contracts

because their businesses are owned by white males. Therefore, defendants' use of set-aside contracts, plaintiffs argue, unconstitutionally discriminates against plaintiffs based upon their race and sex.

It is undisputed that defendants have made no findings of prior discrimination in the construction industry in Michigan. Defendants respond that they are merely implementing a federal construction statute authorizing state recipients of federal funds to utilize set-asides. Plaintiffs do not challenge the constitutionality of the federal authorization statute. The gravamen of plaintiff's complaint is the charge that defendants are unconstitutionally implementing the federal statute by the use of set-aside contracts.

In their Third Amended Complaint, plaintiffs claim that defendants have violated the Fourteenth Amendment of the United States Constitution, 42 U.S.C. § 1981, 42 U.S.C. § 1983, and 42 U.S.C. § 2000(d), Title VI of the Civil Rights Act of 1964. A bench trial was held on November 7 and 8, 1990 and post-trial arguments were heard on December 20, 1990. The parties have thoroughly briefed the issues. After careful consideration of the record, the court holds that plaintiffs have not carried their burden of establishing standing. Further, the court holds that even if plaintiffs had established standing, defendants have not acted unconstitutionally. Consequently, plaintiff's prayer for declaratory and injunctive relief is denied.

## I. Findings of Fact

1. Plaintiff Michigan Road Builders Association, Inc. ("Road Builders") is an association of contractors whose members perform highway construction contracts in the State of Michigan. Among the association's purposes, according to its constitution, is "to combat unfair practices." Road Builders' Constitution, art. II, Pl. Exh. 15. Another purpose is to "conduct only those activities which are for the common good and benefit alike for all members." *Id.*

Approximately 75% of the dollar volume of all state and federal road contracts in Michigan is performed by Road Builders' members. Tr. at 49. The association has approximately 120 members, approximately six of whom are certified Disadvantaged Business Enterprises ("DBEs"). Tr. at 49. The Executive Director of Road Builders, Lawrence Martin,

testified that members of his association desire to bid on MDOT set-aside projects but are prohibited from bidding on such projects. Tr. at 45-46.

2. Individual plaintiffs are contractor and subcontractor firms. The only individual plaintiff who testified was Dorset Goff ("Goff"), owner of Spartan Sign, Inc. ("Spartan"). Spartan fabricates and erects highway traffic control signs and is a member of the Road Builders. Tr. at 312.

At trial, Goff was shown two advertisements from issues of the magazine, *Michigan Roads and Construction*. Tr. at 313; Pl. Exh. 22 and 23. Both of the advertisements were for MDOT contracts in which the bidder was required to be a DBE. Pl. Exh. 22 at 14; Pl. Exh. 23 at 14. Goff testified that his company would have bid on the projects if the advertised projects had not been set aside for DBE firms. Tr. at 313. Apparently, Goff would have bid on such projects because his company is capable of doing the work described in the advertisements. Tr. at 312. However, Goff testified that Spartan has not applied for certification as a DBE. Tr. at 314.

3. Defendant James J. Blanchard was the governor of Michigan at the time this action was initiated. Defendant Michigan Department of Transportation ("MDOT") is a department of the executive branch of the state of Michigan. Defendant Pitz was the executive officer of MDOT and was responsible for executing the policy of the Michigan Transportation Commission. Defendant Commission is a constitutionally established body charged with establishing policy for MDOT. Mich. Const. art. 5, § 28. Defendants William C. Marshall, Rodger D. Young, Hannes Meyers, Jr., Stephen F. Adamini, Shirley E. Zeller, and Nansi I. Rowe, were members of the Commission and were officially responsible for establishing policy for MDOT.

4. In 1983, the United States Congress enacted a transportation authorization act entitled the Surface Transportation Assistance Act of 1982 ("STAA"), Pub. L. No. 97-424, 96 Stat. 2097. Section 105(f) of STAA provided:

> Except to the extent that the Secretary determines otherwise, not less than 10 per centum of the amounts authorized to be appropriated under this Act shall be expended with small business concerns owned and

> controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act (15 U.S.C. § 637 (d)) and relevant subcontracting regulations promulgated thereto.

96 Stat. at 2100.

The United States Department of Transportation promulgated regulations implementing this section. 48 Fed. Reg. 33432 *et seq.*, (codified at 49 C.F.R. § 23 (1986)). STAA incorporated the definitions of social and economic disadvantage of section 8 of the Small Business Act, 15 U.S.C. § 637(d), and the regulations promulgated pursuant to it. 49 C.F.R. § 23.

In 1987, Congress passed a subsequent transportation authorization act, the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA"). Pub. L. 100-17, 101 Stat. 132.

Section 106(c) of STURAA contained essentially identical language to section 105(f) of STAA. STURAA also provided that not less than 10 percent of the funds authorized under the statute shall be awarded to disadvantaged businesses. 101 Stat. at 145. In addition, STURAA included women as a group presumed to be disadvantaged, refined the definition of small business, and required the Secretary of Transportation to establish minimum uniform criteria for states to use in determining whether a business can be certified as disadvantaged. 101 Stat. at 145-46.

5. Section 106(c) of STURAA applies to programs under the Federal Highway Administration ("FHWA"). The FHWA and MDOT mutually administer contracts involving federal highway funds in Michigan. As a condition of receiving federal funds for highway construction projects, Michigan must comply with federal regulations implementing STURAA, and specifically, those federal regulations relating to Disadvantaged Business Enterprises ("DBEs"). 49 C.F.R. § 23.68.

STURAA, as did its predecessor STAA, requires that "not less than 10 percent" of the funds authorized for the entire United States shall be awarded to DBEs. Pub. L. No. 100-17, §106(c) (1), 101 Stat. at 145. In order to achieve the national minimum 10% mark, the federal

regulations require that recipients of federal funds under STURAA, such as MDOT, establish an annual goal for the awarding of contracts and subcontracts to DBEs. The state recipient must then submit the goal to the United States Department of Transportation for approval. 49 C.F.R. § 23.64. The regulations permit deviation from the 10% statutory target either upward, 49 C.F.R. § 23.64(d), or downward, 49 C.F.R. §§ 23.64(e), 23.65. Failure of a state recipient of STURAA funds to meet its DBE goals can result in termination of federal funding for federal transportation projects. 49 C.F.R. § 23.68(e) (2).

In setting its annual goal, MDOT is required by the regulations to consider criteria such as the number and types of contracts to be awarded, the number of DBEs available to compete for these contracts, and the results of past efforts to contract with DBEs. 49 C.F.R. §§ 23.64(d), 23.45(g) (5); Tr. at 83-84, 90-96. After considering these factors, MDOT set its fiscal year 1991 DBE goal at 15%. Def. Exh. 25.

The regulations also require that recipients establish individual contract goals for DBE participation on specific prime contracts that have subcontracting possibilities. 49 C.F.R. § 23.45(g) (2) (ii); *see also* 49 C.F.R. part 23, subpart D, App. A. A prime contractor who is unable to meet a contract goal is still eligible to be awarded the prime contract if it can demonstrate good faith efforts to meet that goal. 49 C.F.R. §§ 23.45(g) (2)-(ii), 23.45(h).

6. Under certain conditions, states are required to set aside contracts to be exclusively bid upon and awarded to DBEs. "Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE[1] goals, procedures to implement MBE set-asides shall be established." 49 C.F.R. § 23.45(k).

The regulations direct each state to "take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and

---

[1] "MBE," which is an acronym for "Minority Business Enterprise," is still used in various parts of the Code of Federal Regulations instead of "DBE." However, a "slightly different set of individuals is eligible to own and control a disadvantaged business than is eligible to own and control a minority business enterprise." 49 C.F.R. Subpt. D, App. A.

perform contracts." 49 C.F.R. § 23.43(a) (2). Discrimination based upon race, color, national origin, or sex, in connection with the award and performance of any federal contract under STURAA is prohibited. 49 C.F.R. §§ 23.7, 23.43 (a) (2).

7. For a contracting business to be certified as a DBE, it must meet certain criteria as set forth in 49 C.F.R. § 23.53. A contracting firm is disadvantaged, according to the federal regulations, if it is small and is owned and controlled by individuals who are socially and economically disadvantaged. 49 C.F.R. § 23.62; *see also* 49 C.F.R. Pt. 23, Subpt. D, App. A, B, and C.

Under the regulations, there is a rebuttable presumption that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans who own and control contracting businesses are socially and economically disadvantaged. 49 C.F.R. § 23.62; 49 C.F.R. Pt. 23, Subpt. D, App. C; Tr. at 102.

Other individuals may be found to be socially and economically disadvantaged on a case-by-case basis. 49 C.F.R. § 23.62; 49 C.F.R. Pt. 23, Subpt. D, App. C; Tr. at 102. If an individual applies for DBE certification, the state must make a determination of social and economic disadvantage. 49 C.F.R. Pt. 23, Subpt. D, App. C. "If a firm or other party believes that any recipient's social and economic disadvantage determination is in error, the firm or party may make an administrative certification appeal to the Department [of Transportation] as provided in 49 C.F.R. § 23.55." *Id.*

8. MDOT has implemented the federal regulation's DBE certification procedures set forth in 49 C.F.R. § 23.53 (a) (1)-(6). Tr. at 143-152. Accordingly, MDOT utilizes six criteria in its DBE certification process, including a determination whether the disadvantaged individual is the actual owner and operator of the contracting firm. Tr. at 148. MDOT maintains a DBE Directory which lists all certified DBE's in Michigan with their respective work classifications. Def. Exh. 35.

9. Robert Anderson ("Anderson"), the Division Administrator of the Office of Small Business Liaison in the Bureau of Administration, testified that white male contractors have applied for DBE certification. In the past year, none have met the tests for establishing social and economic disadvantage. Tr. at 154, 255. Anderson testified that denials

of DBE certification of minority or women contractors average approximately twenty percent a year. Tr. at 256.

10. On July 17, 1990, MDOT's Office of Small Business Liaison prepared a report entitled "Development of the 1991 Fiscal Year Overall Goal for DBE Participation. " Def. Exh. 19. This report set out the methodology used by MDOT to calculate its recommendation of the 15% DBE goal for fiscal year 1991. *Id.* The Commission received the report on July 25, 1990. Def. Exh. 21. The following day, the report was submitted to the Federal Highway Administration ("FHWA"). Def. Exh. 20. After reviewing the report, plaintiff Road Builders asserted that it had "no objection to the procedure being used [to compute the 15% goal], which considers prior achievements, DBE contractor availability and the projected construction program." Letter of August 16, 1990 from Lawrence Martin, Executive Director of Road Builders, to Robert Anderson, Def. Exh. 22. Road Builders did object to the establishment of the 15% DBE goal on the basis that there had been no finding of past discrimination in Michigan. *Id.* The Commission received a copy of Road Builders' letter of August 16, 1990. Def. Exh. 23.

On August 22, 1990, the Commission adopted a 15% DBE goal, including a projected use of 1.32% set-aside contracts, for the fiscal year beginning October 1, 1990. Def. Exh. 25. The following day, MDOT sent the 15% DBE goal specifications to FHWA for review and approval. Def. Exh. 27. On October 1, 1990, FHWA approved MDOT's DBE Goal of 15%. Def. Exh. 32; Tr. at 198.

11. On September 26, 1990, the Commission approved forms that allow for the good faith waiver by contractors on certain contracts amenable to DBE subcontracting opportunities. Def. Exh. 30. On September 27, 1990, MDOT's Director forwarded the waiver forms to FHWA for review and approval. Def. Exh. 31. FHWA approved the waiver forms on October 2, 1990. Def. Exh. 33; Tr. at 186. The FHWA approved MDOT's continued use of the Commission's DBE procedures on October 3, 1990. Def. Exh. 34.

12. For fiscal year 1991, MDOT's 15% DBE goal and 1.32% DBE set aside projects apply only to contracts containing federal funds. Tr. at 159-60, 257. Plaintiffs do not assert any unlawful conduct by defendants in the awarding of state-funded contracts. Pl. Posttrial Br. at 2.

13. Plaintiffs do not seek injunctive relief as to the goals or set-asides adopted in any year prior to fiscal year 1991. Plaintiffs seek only prospective injunctive and declaratory relief.

14. Plaintiffs stipulate that STURAA and the regulations adopted pursuant to STURAA, 49 C.F.R. §§ 23.1 *et seq.*, are constitutional for purposes of this action. Tr. at 10, Pl. Trial Br. at 9, Pl. Post-trial Br. at 1.

## II. Conclusions of Law

### A. Eleventh Amendment

The court must first address whether it has jurisdiction over defendants under the Eleventh Amendment to the United States Constitution. The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

In *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989), the United States Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." 491 U.S. at ___, 109 S. Ct. at 2312. However, the Court recognized that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the state.'" 491 U.S. at __ n. 10, 109 S. Ct. at 2312 n. 10; *see also Edelman v. Jordan*, 415 U.S. 651 (1974).

The Sixth Circuit recently held that "*Will* leaves ample room for an action against state officials insofar as it seeks prospective relief allowed by the Eleventh Amendment." *Sutton v. Evans*, 918 F.2d 654, 657 (6th Cir. 1990). The present lawsuit seeks prospective injunctive relief. Therefore, the claims against the individual defendants- Blanchard, Pitz, and the members of the Commission- are not precluded by the Eleventh Amendment. However, the Fourteenth Amendment, § 1983, and § 1981

claims against MDOT and the Commission will be dismissed because these entities are state agencies, not state officials.[2]

B. Governor Blanchard

Defendants argue that plaintiffs have presented no allegations of wrongdoing by Governor Blanchard. The court agrees. There was no testimony at trial alleging the governor had any role in establishing the Commission's use of set-asides or the DBE goal. In fact, policy-making for MDOT is established by the Commission. Tr. at 252-53. As plaintiffs have presented no facts that would indicate that Governor Blanchard had any decision-making role in the Commission, he will be dismissed from this action.

C. Standing

Defendants claim that plaintiffs have not established standing to challenge the constitutionality of the MDOT program. Plaintiffs allege no injury to Road Builders itself, but rather, it is their claim that individual members of the association, including individual plaintiffs, have been harmed by the program.

Article III of the United States Constitution limits the jurisdiction of the federal courts to actual cases or controversies. U.S. Const. art. 3, § 2. The standing doctrine is one aspect of this case or controversy requirement. *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968). The standing requirement weeds out claims "in which the plaintiff has failed to make out a case or controversy between himself and the defendant. " *Gladstone. Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). The standing doctrine is based on the practical necessity of assuring "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues. " *Baker v. Carr*, 369 U.S. 186, 204 (1962).

---

2 Plaintiffs' claim under 42 U.S.C. § 2000d, Title VI, will proceed against all defendants under the express abrogation of Eleventh Amendment immunity in 42 U.S.C. § 2000d-7(a)(1). *See Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (In enacting Title VI, Congress authorized an implied private cause of action for victims of the prohibited discrimination).

The burden is on plaintiffs to "clearly and specifically" set forth facts sufficient to establish standing. *Whitmore v. Arkansas*, __ U.S. ___, 110 S. Ct. 1717, 1723 (1990). Of course, the court's threshold inquiry into standing is unrelated to the merits of plaintiffs' substantive legal contentions. *Whitmore*, 110 S. Ct. at 1723.

To establish an Article III case or controversy, a plaintiff must meet three requirements. First, if a plaintiff seeks declaratory and injunctive relief, as plaintiffs do here, he must demonstrate that he is likely to suffer future injury. The most effective way of demonstrating future injury is to show past or present injury. Second, a plaintiff must show that he is likely to suffer such injury at the hands of the defendant. Third, the plaintiff must establish that the relief he seeks will likely prevent such injury from occurring in the future. *Whitmore*, 110 S. Ct. at 1725.

The first prong--injury in fact--must be "concrete in both a qualitative and temporal sense. " *Whitmore*, 110 S. Ct. at 1723. Plaintiff must allege an injury to himself which is "distinct and palpable," as opposed to merely "abstract." *Id.* The alleged harm must be "actual or imminent, not conjectural or hypothetical." *Id.* (citations omitted).

As for the standing of the individual plaintiffs in this case, only Spartan Sign, Inc. can plausibly argue standing. Spartan's president, Goff, testified that he would have bid on the advertised projects which he perused, apparently for the first time, in court. This does not establish standing.

First, Goff never applied for certification as a DBE. Plaintiffs would have the court assume that Goff would have been discriminated against based upon his sex and race had he applied for DBE certification. The court may not engage in such speculation. *See Whitmore*, 110 S. Ct. at 1723 (A federal court may not create its own jurisdiction by embellishing otherwise deficient allegations of standing). Rather, from the testimony the court heard, it could only assume that if Goff had met the requirements for establishing social and economic disadvantage, he would have been certified as a DBE regardless of his race and sex.

Second, Goff did not apply for either of the contracts shown to him in the advertisements. Nor did Goff testify that Spartan was available to complete the advertised projects. He only testified that he would have applied for the contracts because those were the type of projects upon which his company normally bid. Thus, the alleged injury Goff sustained

is purely conjectural and hypothetical. Plaintiffs have not shown any real, concrete injury.

The Eleventh Circuit recently dismissed for lack of standing a group of contractors' challenge to DBE set-asides. *Cone Corp.v. Florida Department of Transportation*, 921 F.2d 1190 (11th Cir. 1991). In *Cone*, the plaintiff contractors "did not point to any specific contract they lost because the Secretary [of the Florida Department of Transportation] discriminated against them on account of their race. " 921 F.2d at 1206; *see also Id.* at 1206 n. 50. The Eleventh Circuit continued:

> In short, the plaintiffs' allegations of past racial discrimination are nothing more than bald conclusions. The plaintiffs' allegations of future injury suffered the same infirmity; the plaintiffs merely concluded that, because of the Secretary's DBE requirements, "they will be injured in their business or property." . . . The plaintiffs provided the district court no facts . . . from which the court could predict whether the Secretary would deny them equal protection of the laws in awarding future highway construction contracts.

*Id.* at 1206. In the end, the Eleventh Circuit declined "to imagine an injury sufficient to give plaintiffs standing when they have demonstrated none." *Id.* at 1210.

In *Carpenter v. Barnhart*, No. 88-3678, slip op. (4th Cir. January 16, 1990) *(per curiam)*, plaintiffs in a DBE set-aside lawsuit alleged standing based upon "their loss of opportunities to contract with a government agency or department." Slip op. at 9. The Fourth Circuit found that this claim amounted "to no more than an assertion of hypothetical loss of bids." *Id.* Plaintiffs' claim was "an abstract grievance about the DBE program. The federal courts are not 'publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding. '" *Id.* at 9-10 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State. Inc.*, 454 U.S. 464, 473 (1982)).

By merely pointing to advertised projects and testifying that he would have bid on such projects, Goff has not established standing. The

court must speculate that Goff would have been discriminated against had he applied for DBE certification because he is a white male. The court must then conjecture that Goff would have applied for the contracts and been available to perform the advertised projects. For these reasons, Goff has not established standing.

"Even in the absence of injury to itself, an association may have standing solely as the representative of its members. ' *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 281 (1986) (citation omitted). An association may litigate in federal court on behalf of its members if its members "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . ." *Warth v. Selden*, 422 U.S. 490, 511 (1975). "So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction. *Id.*

The Supreme Court has expressed this doctrine in a three-part test. An association has standing to bring suit on behalf of its members when:

1) its members would otherwise have standing to sue in their own right;

2) the interests it seeks to protect are germane to the organization's purpose; and

3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

The first prong of the *Hunt* test does not require that each and every member of an association must show injury in fact. *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 735 F. Supp. 1274, 1286 (E.D. Pa. 1990). However, in this case, no member of Road Builders has shown standing. For the court to assume that members of Road Builders exist who would be discriminated against based upon their race and sex would be pure conjecture.

The United States Supreme Court has dismissed an action by a home builders association asserting a claim for prospective relief from a town's zoning ordinance which the association alleged denied low income citizens' housing. *Warth v. Seldin,* 422 U.S. 490 (1975). In *Warth,* the association did not aver that any of its members had applied to respondents for a building permit or a variance with respect to any projects. 422 U.S. at 516. The Court continued:

> Indeed, there is no indication that respondents have delayed or thwarted any project currently proposed by Home Builders' members, or that any of its members has taken advantage of the remedial processes available under the ordinance. In short, insofar as the complaint seeks prospective relief, Home Builders has failed to show the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention.

422 U.S. at 516.

In *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia,* 735 F. Supp. 1274 (E.D. Pa. 1990), members of contractor associations claimed that they were discriminated against by the city's use of set-aside contracts. The court held that "the associations must show the injury suffered by their members with some specificity. " *Id.* at 1283. In an attempt to establish standing, members of associations submitted affidavits setting forth their alleged injuries.

The court held that five contractor associations did not have standing to sue because their members' affidavits did not provide sufficient details of their injuries. *Id.* at 1284. The members of these associations only asserted that they would "generally" bid on the types of projects that were set-aside. *Id.* This conjecture, the court held, was "too speculative to meet the injury in fact requirement." *Id.*

Members of other associations submitted affidavits in which they asserted that they had bid on certain contracts. *See* 735 F. Supp. at 1283 n. 3. Those members had made affirmative, concrete steps to bid on specific contracts and thus had standing to challenge set-aside contracts. *Id.* at 1283.

Here, Road Builders allegations of injury are just as weak as the plaintiff associations in *Warth* and *Contractors Association*. Road Builders complaint alleges that defendants' use of set-asides "have adversely affected and/or will in the future adversely affect the ability of such Plaintiffs to bid on, compete for, and be awarded public work contracts of the Department of Transportation." Pl. Third Amended Complaint, ¶ 16. This is a constitutionally inadequate allegation of standing.

Road Builders not only has failed to establish the injury-to-its-members prong of the associational standing test, but has also failed the associational purpose prong. The interests Road Builders seeks to protect do not appear to be germane to the association's purposes. Article II of the Road Builders' Constitution and By-Laws lists the "specific purposes" of the association. The second specific purpose states that Road Builders will "conduct only those activities which are for the common good and benefit alike *for all members.*" Pl. Exh. 15 (emphasis added).

Road Builders' executive director testified that "probably a half a dozen" members of the association are certified as DBEs. Tr. at 49. The conduct of this lawsuit by Road Builders could hardly be held for the common good and benefit of *all* members of the association. If the suit should be successful, Road Builders members who are DBEs would have to compete among all contractors for projects that previously were limited to fellow DBEs. Consequently, Road Builders has failed to meet two prongs of the *Hunt* test and thus may not establish associational standing.

Road Builders argues that defendants are collaterally estopped from raising standing because in a prior case between Road Builders and the State, the courts were untroubled by the standing issue. *See Michigan Road Builders v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1061 (1989). The principle of collateral estoppel only applies if the issues presented in both cases are "substantially the same." *Cutler v. Hayes*, 818 F.2d 879, 889 (D.C. Cir. 1987). Since standing was never discussed in the earlier Road Builders case, the issues were not substantially the same as the present case. Further, the earlier Road Builders suit concerned a state set-aside program. Therefore, plaintiffs collateral estoppel argument is without merit.

Road Builders cannot claim to be caught unaware by the standing issue. Defendants argued the issue in their trial brief, citing many of the cases relied upon in this opinion. Def. Trial Br. at 43-45.

Defendants moved for directed verdict based upon lack of standing when plaintiffs closed their case. Tr. at 119-123. In "rebuttal," plaintiffs presented Goff in an attempt to establish standing. Tr. at 311-314. In defendants' post-trial brief, standing was again argued. Pl. Post-trial Br. at 29-33. Finally, the issue was once again raised at post-trial closing arguments. Closing Argument Tr. at 360-67.

Plaintiffs have failed to carry their burden of establishing standing. The member of Road Builders who, but for his race and sex, would be qualified to be a DBE and available for a specific project, might be "out there." But plaintiffs simply have not brought that contractor to the court's attention.

D. Constitutionality

Even if plaintiffs had established standing, defendants have not acted unconstitutionally. Plaintiffs present two basic arguments. First, plaintiffs contend that defendants are using the federal authorization statute, STURAA, as a pretext for unconstitutional discrimination. Second, plaintiffs argue that defendants are unconstitutionally implementing STURAA by their use of set-asides. In order to utilize set-asides, plaintiffs argue, defendants must make prior findings of discrimination in Michigan.

Plaintiffs first contend that defendants are merely using STURAA as a means to unconstitutionally continue a set-aside system that was struck down by the Sixth Circuit in 1987, a ruling subsequently affirmed by the Supreme Court in 1989. Plaintiffs refer to *Michigan Road Builders Association, Inc. v. Milliken,* 834 F.2d 583 (6th Cir. 1987), *aff'd,* 489 U.S. 1061 (1989) ("Road *Builders I").*

The present case is different from *Road Builders I. Road Builders I* concerned a state set-aside program for construction projects containing only state, not federal, funds. As the twelfth finding of fact indicates, plaintiffs in this action are only challenging highway contracts containing federal funds. Contracts containing solely state funds are no longer a part of the set-aside program, in accordance with *Road Builders I.* Thus, *Road Builders I* is essentially irrelevant to the issues presently before the court.

As to plaintiffs second argument concerning defendants' implementation of STURAA, the key question is whether the analysis will

be under *Fullilove v. Klutznick*, 448 U.S. 448 (1980) or *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). In *Fullilove*, the Supreme Court rejected a facial challenge to the constitutionality of a federal affirmative action statute requiring that 10% of federal funds granted for local public works projects be used to procure services or supplies from minority businesses.

In *Croson*, the Court struck down a city minority business set-aside program enacted for the purpose of promoting participation by minority business enterprises in the construction of public projects. In *Croson*, the city failed to support its program with past findings of discrimination, just as the state of Michigan failed to support its set-aside program in *Road Builders I*.

The overriding distinction between the federal program held constitutional in *Fullilove* and the state and city programs held unconstitutional in *Croson* and *Road Builders I* is Congress' hand in the *Fullilove* program, and conversely, Congress' lack of involvement in *Croson* and *Road Builders I*. In *Fullilove*, the Supreme Court emphasized Congress' power to "provide for the general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantee of the Fourteenth Amendment. U.S. Const. art. I, § 8, cl. 1; U.S. Const. amend. XIV, § 5; *Fullilove*, 448 U.S. at 472. Because of these powers, Congress "acted within its competence" in imposing an affirmative action program to remedy nationwide discrimination in the construction industry. *Id.* at 478.

Last term, the Supreme Court addressed whether minority preference policies of the Federal Communications Commission were a violation of equal protection. *Metro Broadcasting, Inc. v. Federal Communications Commission*, ___ U.S. ___, 110 S. Ct. 2997 (1990). The Court found it of "overriding significance" that the minority programs were "specifically approved-- indeed, mandated-- by Congress. " 110 S. Ct. at 3008. The Supreme Court extensively cited *Fullilove* as precedent for its decision in *Metro Broadcasting*. *See* 110 S. Ct. at 3008-3009.

In *Croson*, Justice O'Connor, in a section of her opinion joined by Justices Rehnquist and White, distinguished *Croson* from *Fullilove*. Justice O'Connor quoted from Chief Justice Burger's opinion in *Fullilove*. "'Congress not only may induce voluntary action to assure compliance with

existing federal statutory or constitutional anti-discrimination provisions, but also, where Congress has authority to *declare certain conduct unlawful*, it may, as here, authorize and induce state action to avoid such conduct.'" *Id.* at 488 (quoting *Fullilove*, 448 U.S. at 483-84 (opinion of Burger, C.J.)) (emphasis added by O'Connor, J.). Furthermore, Justice O'Connor stressed that Congress "could mandate state and local government compliance with the set-aside program" at issue in *Fullilove*. *Id.* at 487.

"The joint lesson of *Fullilove* and *Croson* is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that [states] could not do without federal authorization." *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419, 423-24 (7th Cir. 1991) (Posner, J.).

STURAA is very similar to the program upheld in *Fullilove*. In the statute at issue in *Fullilove*, as in STURAA, Congress relied on an administrative agency to flesh out the implementation of the statute consistent with Congress' intentions and objectives. *See Fullilove*, 448 U.S. at 468. The Supreme Court held that the *Fullilove* program was constitutional on its face. Here, plaintiffs concede that STURAA and the federal regulations applying it are constitutional.

At issue in the present case, then, is a state agency's implementation of a Congressionally authorized federal program. No relevant authority-- not STURAA itself, not the federal regulations, not *Fullilove*, and not *Croson*-- requires the state recipient of federal funds to conduct any inquiry to determine the existence of prior discrimination in the state construction industry in implementing STURAA. Instead, the federal regulations direct the state recipient to follow a number of steps to determine an appropriate goal. The state has followed those steps and plaintiffs do not object to the outcome defendants reached in following the steps.

In *Milwaukee Pavers*, plaintiffs made a nearly identical challenge to state implementation of STURAA as plaintiffs make here. Plaintiffs in both cases conceded the constitutionality of STURAA and the implementing regulations. In *Milwaukee Pavers*, Judge Posner, writing for a unanimous Seventh Circuit panel, asserted, "Insofar as the state is merely doing what the statute and regulations permit, the attack on the state is an

impermissible collateral attack on the statute and regulations." 922 F.2d at 424. Plaintiffs' position that state implementation of STURAA must be accompanied by a state determination of prior discrimination has been rejected by every federal court that has considered the issue. *See Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991); *Tennessee Asphalt Co. v. Farris*, No. 3-85-1176, slip op. (M.D. Tenn. June 14, 1990), *app. pending*, No. 90-5945 (6th Cir.); *Ellis v. Skinner*, 753 F. Supp. 329 (D. Utah 1990); *Harrison & Burrowes Bridge Constructors. Inc. v. Cuomo*, 743 F. Supp. 977 (N.D. N.Y. 1990).

Plaintiffs argue that STURAA and the federal regulations only allow the states to establish a strict 10% goal. This assertion is directly contradicted by the plain language of STURAA, which states that "not less than" 10% of the funds appropriated across the country shall be awarded to DBEs. The regulations also belie plaintiffs' argument by clearly allowing a state recipient of federal funds to set a goal of more than 10%. *See* 49 C. F.R. § 23.64(d).[3]

Consequently, plaintiffs' argument ultimately rests on the constitutionality of defendants' use of 1.32% set-asides to reach the federally-approved 15% goal. The regulations, by their plain language, allow for the use of set-asides. 49 C.F.R. § 23.45(k). Two criteria must be met before a state institutes set-asides. First, the state must determine that set-asides are necessary to meet its goals. The state has made that determination in this case and the federal government has approved the state's determination. Second, the use of set-asides must not be prohibited by state or local law. *Id.*

Defendants argue that this court does not have jurisdiction to rule on whether state law prohibits set-asides, under the doctrine set forth in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1983). The court disagrees. The court has jurisdiction to decide whether defendants' compliance with the federal regulations is constitutional. Those regulations explicitly direct that the set-aside provision is not to be utilized if state law forbids such a practice. *Cf. Jerome v. United States*, 318 U.S. 101 (1943) (Congress may enact a statute making the application of federal law dependent on state law). Thus, in order to determine if defendants are

---

[3] Plaintiffs' argument is puzzling because counsel informed the court that he had "no problem" with the state setting a goal above 10%. Closing Argument of plaintiffs' counsel, Tr. at 338.

adhering to the federal regulations, the court must inquire whether state law forbids set-asides.

Plaintiffs further argue that the Michigan Constitution prohibits set-asides. The Michigan Constitution provides:

> Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color, or national origin. The legislature shall implement this section by appropriate legislation.

Mich. Const. art. I, § 2.

The first clause, dealing with equal protection, has been held to be identical to the Fourteenth Amendment of the United States Constitution. *People v. Walker*, 135 Mich. App. 267, 354 N.W.2d 312 (1984), *app. dismissed*, 474 U.S. 801 (1985). As *Fullilove* and *Metro Broadcasting* teach, the limited use of affirmative action when authorized by a federal statute does not violate the Fourteenth Amendment.

The Michigan legislature is directed in section 2 to implement the section's provisions. Thus, if the legislature passed a statute that banned the use of set-asides in Michigan, the use of set-asides would be prohibited in Michigan. Were this the case, defendants would not be able to utilize set-asides under 49 C.F.R. §23.45(k). However, plaintiffs have not cited any Michigan statute that bars the use of set-asides.

Similarly, plaintiffs have not cited any Michigan state court decision that has struck down set-asides based upon section 2 of the Michigan Constitution. This court will not interpret the Michigan Constitution as prohibiting set-asides without any indication that Michigan state courts or the Michigan legislature would interpret the state constitution in such a manner. Therefore, the court holds that the state's use of set-asides is not prohibited by state law.

## III. Conclusion

Plaintiffs failed to clearly and specifically establish standing. Plaintiffs presented an abstract case of discrimination and the court is powerless to embellish plaintiffs' allegations. Even if plaintiffs had established standing, there was no showing that defendants did anything but conscientiously follow an undisputedly constitutional federal statute. Thus, defendants have acted constitutionally. Plaintiffs' claims for declaratory and injunctive relief are denied.

Douglas W. Hillman
Senior Judge

Dated: April 11, 1991

BUREAU OF ADMINISTRATION

DBE Goal Recommendations

Based on a review of the Department's data regarding DBE's contracting history, projections and correspondence received from the US Department of Transportation, it is recommended that the Commission adopt a 15 percent minimal DBE goal.

A motion was made by Commissioner Adamini, with support from Commissioner Zeller, that a 15 percent minimal DBE goal be adopted by the Michigan Department of Transportation on all federally funded construction projects.

Vice Chairman Young said that he would vote against the Department recommendation because he felt it was illegal for this Department to set a 15 percent DBE goal. He added that he grounded this opinion on applicable case law and specifically the Department's total failure to document any past discrimination whatsoever to support this action. He also said that there is not an adequate inventory of DBE contractors to effectively utilize this amount of public funds.

Commissioner Adamini agreed with Vice Chairman Young regarding insufficient documentation of past discrimination by MDOT. However, Commissioner Adamini said that under the 1987 Surface Transportation Uniform and relocation Assistance Act the ten percent requirement is a minimum for nationwide DBE participation that this Department is expected to attain, not a ceiling on goals that the Department may set. More importantly, this 15% recommendation is based on the federal criteria, not a specific finding of past discrimination in Michigan.

Commissioners Meyers and Zeller felt that in order to determine where the Department stands at this time there should be more

documentation provided to the State Transportation Commission on alleged past discrimination practices in the awarding of contracts. The Commission requested that the Department initiate efforts to produce the necessary documentation on this issue.

The motion carried on a roll call vote with Commissioners Marshall, Zeller, Adamini and Meyers all voting "yes," and Vice Chairman Young, voting "no."

It was moved by Commissioner Meyers, with support from Vice Chairman Young, that the Department be requested, under a reasonable period of time, to provide the Commission with a status report on the success or failure of this program. The motion carried on a unanimous voice vote.

Commissioner Adamini said that there should be enough documentation available regarding any alleged past discrimination practices in case we are called upon for this information at a later date.

MAINLINE 90

Mr. Adams gave a slide presentation for the Commission regarding the proposed highspeed rail corridor between Detroit and Chicago.

Vice Chairman Young stated his opposition regarding a highspeed rail project. He felt Mainline 90 was too expensive for the minimal amount of projected increased ridership. He felt air travel was more efficient. Director Pitz said that Mainline 90 was not to compete for airline passengers, but as a faster and safer way of travel for those who now drive this route. Mainline 90 has stops at several locations between Detroit and Chicago.

A new Commission Subcommittee on Highspeed Rail was established with Chairman Marshall, Vice Chairman Young and Commissioner Meyers as the members.

Chairman Marshall recognized Mr. Al Gibauer and David Brickey for their favorable comments on Mainline 90 project.

The meeting was adjourned by the Chairman at noon.

/s/

_____

Chairman

/s/

_____

Executive Secretary

# MICHIGAN STATE TRANSPORTATION COMMISSION POLICY

## FEDERAL DBE/MBE/WBE AND STATE HBO PROGRAM COMMITMENT

It is the policy of the Michigan State Transportation Commission to ensure that firms owned and controlled by disadvantaged individuals, minorities, and women, participate in federal-aid contracts and grants entered into and administered by the Michigan Department of Transportation (MDOT). It is also the policy of the Michigan State Transportation Commission to insure that firms owned and controlled by handicappers participate in state-funded contracts and grants entered into and administered by the department. These policies shall be implemented as follows:

### Responsibilities

The Director of Michigan Department of Transportation, shall be responsible for implementation of the Disadvantaged Business Enterprise (DBE), Minority Business Enterprise (MBE), Women Business Enterprise (WBE), and Handicapper Owned Business (HBO) Program. The director shall designate a liaison officer to administer the program. The liaison officer shall be responsible for administering all aspects of the DBE/MBE/WBE/HBO Program within the department.

The liaison officer and staff, supported by operating divisions, shall be responsible for developing, managing, and implementing the program on a day-to-day basis. The liaison officer shall also be responsible for carrying out technical assistance activities, for disseminating information on available business opportunities so that DBEs/MBEs/WBEs/HBOs are provided an opportunity to participate in the department's contracts, and for maintaining an accurate and up-to-date directory of DBEs/MBEs/WBEs/HBOs in the state.

### Goals

The department shall annually recommend DBE/MBE/WBE/HBO goals to the Commission. Upon receiving the recommended goals the Commission shall establish those goals that they feel appropriate and as required by federal and state law.

These goals will be set in percentage of the dollar value of construction contracts to be awarded, and the dollar value of goods, services, materials and supplies purchased for the department.

The department shall set one combined goal for DBEs where federal-aid funds are involved.

Contract goal(s) shall be set for specific construction contracts, consulting, procurement and service contracts or grants with subcontracting opportunities. Prospective recipients of department contracts must assure the department of their intent to meet the established goal(s) in order to be eligible for award.

Recognizing the department's commitment to DBEs/MBEs/WBEs/HBOs and recognizing that inequities have limited DBEs/MBEs/WBEs/HBOs in their ability to obtain adequate working capital, bonding and prerequisite experience necessary to be competitive, a set-aside technique will be used by the department. The set-aside technique, included in the regular lettings, will be used to meet the overall goals and to provide construction services and procurement opportunities for DBEs/MBEs/WBEs/HBOs. Participation in set-aside contracts will provide firms the opportunity to gain experience in the transportation industry.

The percentage goal(s) for the dollar value of work and services for the DBE Program are subject to review by the United States Department of Transportation (USDOT).

Adopted by the Michigan State Transportation Commission _____
Date

_____
William C. Marshall, Chairman

# OFFICE MEMORANDUM

DATE: August 16, 1990

TO: State Transportation Commission

FROM: James P. Pitz
Director

SUBJECT: DBE Goal Recommendation For Fiscal Year 1991

At the State Transportation Commission's meeting of July 25, 1990, the Department presented a report dated July 17, 1990, and titled Development of the 1991 Fiscal Year Overall Goal for DBE Participation. Attached to the report was a narrative description of the methodology the Department uses to establish the overall goal for DBE participation.

The Department's methodology complies with the U.S. DOT's regulations at 49 CFR 23.45(g). The Department in developing the recommendation for the overall goal for DBE participation in FY 1991 considered the following factors:

1. The past results of MDOT's efforts to contract with DBEs and the reasons for the high or low level of those results.

2. A projection of the number and types of DBEs likely to be available to compete for contracts over the period during which the goals will be in effect.

3. A projection of the number and types of contracts to be awarded by the applicant over the period during which the goals will be in effect.

Pursuant to the requirements of the U.S. Department of Transportation's (U.S.DOT) regulations at 49 CFR, Part 23.45 (g)(6), the Michigan Department of Transportation (MDOT) has completed its annual review of the overall goal for Disadvantaged Business Enterprise (DBE) participation. In the review process, we analyzed the projected versus actual DBE participation during the 1990 fiscal year. Based on actual DBE awards and commitments through the second quarter of FY 1990, and the projected and designated DBE participation planned for the remainder of the year, the Office of Small Business Liaison (OSBL) projects that the value of DBE participation in FY 1990 will be 15.37%.

The forecast contained in the report showed that the maximum level of DBE participation in FY 1991 is projected to be 15.67%. This percentage represents the Department's calculation of the maximum opportunity for DBEs to participate in the performance of federally funded contracts as required by 49 CFR 23.43(a).

It should be noted that the FY 1991 forecast for DBE participation, in trunkline related construction, was developed using the set-aside technique. The set-asides included in the forecast amount is $4,207,000, compared to a total of federally funded contracts of $317,228,000. This means that 1.32% of the forecast would be met by set-asides with the remaining 14.35% being met by other means. The Department has determined that use of the set-aside technique on a small number of projects is essential in order for the Department to establish and meet a goal which will provide DBEs with the maximum opportunity to participate in the performance of federally funded contracts and subcontracts.

In addition to the use of set-asides as an affirmative action technique to provide DBEs with increased opportunities, the Department considers the use of set-asides as a valuable tool to be used to address the following conditions:

1. Maintaining a positive cash flow is a major problem identified by DBEs. DBEs experience payment problems in their subcontracting relationships with prime contractors. The delays DBEs encounter in receiving timely payment often create severe working capital problems for the DBEs. The Department's set-aside program is designed to provide DBEs with a source of work that provides a steady flow of funds under the DBEs control. The Department considers its efforts

in this regard as affirmatively assisting and impacting on this significant problem faced by DBEs.

2. In order to enter the mainstream as transportation related contractors, need to gain experience as prime contractors. Through the use of the set-aside technique, the Department offers opportunities to DBEs to become prime contractors and gain experience in handling all aspects of projects from bidding the work to the point the project is finaled out. This experience is essential for the growth and development of DBEs. Performing as a prime contractor enhances the DBEs' prospects of receiving favorable consideration by bonding companies, insurance companies and suppliers.

As reported at the Commission meeting of July 25, 1990, the Department has scheduled a number of opportunities for interested parties to review and comment on both the methodology used to develop the overall goal recommendations and the report which contains the forecast for FY 1991. The following is a listing of the activities the Department has undertaken to seek the review and comments from interested parties:

| DATE | ACTIVITY |
|---|---|
| June 22, 1990 | Methodology presented to the DBE Advisory Committee for review and comment at their regular meeting. |
| June 27, 1990 | Methodology transmitted to all MDOT Bureaus for their use in developing the forecasts of FY 1991 DBE participation. |
| July 9, 1990 | Bureau of Administration staff met with MRBA staff and reviewed the methodology and shared the results of the forecasted DBE participation on proposed FY 1991 trunkline construction projects. |
| July 14, 1990 | OSBL staff met with the MHI-CAP members and reviewed the methodology and shared the results of the forecasted DBE participation on |

proposed FY 1991 trunkline construction projects.

July 25, 1990 — Methodology and Report Re: Development of the 1991 Fiscal Year Overall Goal for DBE Participation presented to the State Transportation Commission.

July 26, 1990 — Methodology and Report submitted to U.S.DOT (FAA,UMTA and FHWA) with an explanation of MDOT's expanded deliberative review process and a request for approval of a delay in submitting an overall goal until August 23, 1990.

July 26, 1990 — Methodology and Report mailed to DBE Advisory Committee. This matter is on the Committee's scheduled August 8, 1990 meeting Agenda for review and discussion.

July 26, 1990 — Methodology and Report mailed to industry associations, other interested State Agencies, and MDOT Bureaus for review and comment. NOTE: The transmittal indicated that OSBL staff was available to meet, on an individual basis, with any group so desiring such a meeting during the week of August 6-10, 1990.

August 8, 1990 — DBE Advisory Committee meeting was held. Review and discussion of the methodology and report was the primary focus of the meeting.

August 10, 1990 — Comments due regarding Methodology and Report.

At the close of business on Tuesday, August 14, 1990, the Department had received only two comments from interested parties. The comments received were as follows:

1. On August 8, 1990, at the Department's DBE Advisory Committee meeting, Mr. Joseph Malloure, of C.A. Hull, Inc., and a member of the MRBA's DBE Task Force, asked if the use of the Department's prior achievements relative to DBE participation was appropriate in light of recent U.S. Supreme Court decisions. He inquired whether or not the use of such data, without the Department having made specific findings regarding discrimination in Michigan, was appropriate.

   OSBL staff explained that, with regard to federally funded programs, the U.S. Congress has over a long period of time scrutinized conditions in public contracting to determine whether programs for businesses owned by minorities, women or other disadvantaged persons were necessary. Congress has established an abundant historical basis for concluding that remedial action for past discrimination was necessary and demonstrated a factual predicate for enacting the Surface Transportation Assistance Act of 1982, and the Surface Transportation and Uniform Relocation and Assistance Act of 1987. Since Congress has exercised is authority to determine that nationwide legislation is necessary, no further findings by the State are necessary.

2. On Saturday, August 11, 1990, OSBL staff reviewed the methodology and report with the membership of the Michigan Highway Contractors Assistance Projects, Inc. (MHI-CAP).

   The membership of MHI-CAP informed the staff of OSBL that the continued use of the set-aside technique, which provides direct contracting opportunities for DBEs to

perform as prime contractors, is viewed by MHI-CAP's membership as an essential developmental tool which provides them with the experience necessary to gain entry into the mainstream of highway related construction. MHI-CAP's members further stated that their ideal set-aside program is one that is consistent in the number of opportunities offered from year-to-year and is based on a developmental plan for an individual contractor which would assure a consistent level of work over the years to meet the contractor's developmental objectives.

OSBL staff responded that the tenets of MHI-CAP's proposal, the assurance of specific levels of work in specific work classifications for individual contractors, had merit, and that we would continue our discussions on the proposal with them.

Other interested parties whose review and comments were specifically solicited included:

1. Ms. Jane Higo, Executive Director, MEEBOC.

2. Ms. Janice K. Cunningham, Michigan Women Contractors Association/NWBEA.

3. Mr. Andrew McLemore, President, Association of Black General Contractors.

4. Mr. Cliff Gray, National African American Business Association.

5. Mr. Robert Busha, Michigan Asphalt Pavers Association.

6. Mr. Jeffrey Padden, Director, Small Business Services, Michigan Department of Commerce.

7. Mr. Lawrence W. Martin, Executive Director, Michigan Road Builders Association, Inc.

8. Internal to MDOT, the comments of the Deputy Directors of each of MDOT's bureaus were solicited.

It should be noted, that during a telephone conversation between OSBL staff and MRBA staff late Tuesday afternoon, August 14, 1990, the Department was informed that the MRBA would be submitting written comments. At the close of business Wednesday, August 15, 1990, the MRBA's comments had not been received.

The above outlined review process is in addition to the public notice and review process required by the federal regulations after a goal for FY 1991 has been adopted.

If the Commission act on the Department's recommendations on August 22, 1990, the following notice and review process will be implemented.

| | |
|---|---|
| August 22, 1990 | Commission Meeting - STC consideration of the Director's recommendation and request for action. |
| August 23, 1990 | Commission Action Communicated to U.S. DOT - FHWA. If Overall Goal is adopted, a notice will be published in the media announcing the goal, the availability for public inspection of the methodology to establish the goal and that comments will be accepted by MDOT and U.S. DOT for a period of 45 days from the date of the notice. |
| September 26, 1990 | Report submitted to the Commission containing any comments received during public notice period. |
| Early October, 1990 | Forty-five days comment period expires. Final Report prepared relative to the comments |

received and circulated to STC and U.S. DOT.

RECOMMENDATION

Based on the forecast of the maximum level of DBE participation projected for FY 1991, and the reasons set forth in this memorandum and the methodology and report submitted to the State Transportation Commission at the July 25, 1990 meeting, the Department recommends that the 15 percent minimal DBE goal be continued and adopted for the 1991 fiscal year.

The Department further recommends, that the State Transportation Commission reaffirm its policy of using the set-aside technique as a necessary affirmative action tool to achieve the FY 1991 goal. This will provide DBEs with the maximum opportunity to participate in the performance of federally funded contracts and subcontracts.

/s/

Director

# 49 CFR § 23
# SUBPART A - GENERAL

## § 23.1 Purpose.

(a) The purpose of this part is to carry out the Department of Transportation's policy of supporting the fullest possible participation of firms owned and controlled by minorities and women, (MBEs) in Department of Transportation programs. This includes assisting MBEs throughout the life of contracts in which they participate.

(b) This part implements in part section 905 of the Railroad Revitalization and Regulatory Reform Act of 1978 (45 U.S.C. 803); section 30 of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1730); section 19 of the Urban Mass Transportation Act of 1964, as amended (Pub. L. 95-599); Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.); the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 471 et seq.); and Title 23 of the U.S. Code (relating to highways and highway safety). This regulation supersedes all DOT regulations issued previously under these authorities, insofar as such regulations affect minority business enterprise matters in DOT financial assistance programs.

## § 23.2 Applicability.

This part applies to any DOT program through which funds are made available to members of the public for accomplishing DOT's purposes. Contracts and subcontracts which are to be performed entirely outside the United States, its possessions, Puerto Rico, and the North Mariana Islands, are exempted from this part.

## § 23.5 Definitions.

"*Affirmative Action*" means taking specific steps to eliminate discrimination and its effects, to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department.

"*Applicant*" means one who submits an application, request, or plan to be approved by a Departmental official or by a primary recipient as a

condition to eligibility for DOT financial assistance; and "*application*" means such an application, request, or plan.

"*Compliance*" means the condition existing when a recipient or contractor has met and implemented the requirements of this part.

"*Contract*" means a mutually binding legal relationship or any modification thereof obligating the seller to furnish supplies or services, including construction, and the buyer to pay for them. For purposes of this part, a lease is a contract.

"*Contractor*" means one who participates, through a contract or subcontract, in any program covered by this part, and includes lessees.

"*Department*" or "*DOT*" means the Department of Transportation, including its operating elements.

"*DOT-assisted contract*" means any contract or modification of a contract between a recipient and a contractor which is paid for in whole or in part with DOT financial assistance or any contract or modification of a contract between a recipient and a lessee.

"*DOT financial assistance*" means financial aid provided by the Department or the United States Railroad Association to a recipient, but does not include a direct contract. The financial aid may be provided directly in the form of actual money, or indirectly in the form of guarantees authorized by statute as financial assistance services of Federal personnel, title or other interest in real or personal property transferred for less than fair market value, or any other arrangement through which the recipient benefits financially, including licenses for the construction or operation of a Deep Water Port.

"*Departmental element*" means the following parts of DOT"

(a) The Office of the Secretary (OST);
(b) The Federal Aviation Administration (FAA);
(c) The United States Coast Guard (USCG);
(d) The Federal Highway Administration (FHWA);
(e) The Federal Railroad Administration (FRA);
(f) The National Highway Traffic Safety Administration (NHTSA);
(g) The Urban Mass Transportation Administration (UMTA);

(h) The St. Lawrence Seaway Development Corporation (SLSDC); and

(i) The Research and Special Programs Administration (RSPA).

"*Joint venture*" means an association of two or more businesses to carry out a single business enterprise for profit for which purpose they combine their property, capital, efforts, skills, and knowledge.

"*Lessee*" means a business or person that leases, or is negotiating to lease, property from a recipient or the Department on the recipient's or Department's facility for the purpose of operating a transportation-related activity or for the provision of goods or services to the facility or to the public on the facility.

"*Minority*" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) Black (a person having origins in any of the black racial groups of Africa);

(b) Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(c) Portuguese (a person of Portuguese, Brazilian, or other Portuguese culture or origin, regardless of race);

(d) Asian American (a person having origins in any of the original peoples of the Far East. Southeast Asia, the Indian subcontinent, or the Pacific Islands); or

(e) American Indian and Alaskan Native (a person having origins in any of the original peoples of North America.)

(f) Members of other groups, or other individuals, found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, as amended (15 U.S.C. 637(a)).

"*Minority business enterprise*" or "*MBE*" means a small business concern, as defined pursuant to section 3 of the Small Business Act and implementing regulations, which is owned and controlled by one or more

minorities or women. This definition applies only to financial assistance programs. For the purposes of this part, owned and controlled means a business:

(a) Which is at least 51 per centum owned by one or more minorities or women or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by one or more minorities or women; and

(b) Whose management and daily business operations are controlled by one or more such individuals.

"*MBE coordinator*" means the official designated by the head of the Department element to have overall responsibility for promotion of minority business enterprise in his/her Departmental element.

"*Noncompliance*" means the condition existing when a recipient or contractor has failed to implement the requirements of this part.

"*Primary recipient*" is a recipient who receives DOT financial assistance and passes some or all of this assistance on to another recipient.

"*Program*" means any undertaking by a recipient to use DOT financial assistance, and includes the entire activity any part of which receives DOT financial assistance.

"*Recipient*" means any entity, public or private, to whom DOT financial assistance is extended, directly or through another recipient for any program

"*Secretary*" means the Secretary of transportation or any person whom he/she has designated to act for him/her.

"*Set-aside*" means a technique which limits consideration of bids or proposals to those submitted by MBEs.

[45 FR 21184, Mar. 31, 1980, as amended at 46 FR 60459, Dec. 10, 1981]

**§ 23.7 Discrimination prohibited.**

No person shall be excluded from participation in, denied the benefits of, or otherwise discriminated against in connection with the award and performance of any contract covered by this part, on the grounds of race, color, national origin, or sex.

**Subpart B - [Reserved]**

**Subpart C - Department of Transportation Financial Assistance Programs**

**§ 23.41 General.**

(a) *Responsibilities of applicants and recipients.* (1) All applicants and recipients shall follow the requirements of § 23.43.

(2) Applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing the elements set forth in §23.45(3) through (i). This program shall be submitted for approval to the DOT element concerned with the application for financial assistance or project approval.

(i) Applicants for funds in excess of $250,000, exclusive of transit vehicle purchases, under Sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems.

(ii) Applicants for planning funds in excess of $100,000 under section 6, 8, 9 or 9A of the Urban Mass Transportation Act of 1964, as amended.

(iii) Applicants for Section 402 program funds of the National Highway Traffic Safety Administration;

(iv) Applicants for funds in excess of $250,000 awarded by the Federal Aviation Administration to general aviation airports;

(v) Applicants for funds in excess of $400,000 awarded by the Federal Aviation Administration to non-hub airports; and

(iv) Applicants for planning funds in excess of $75,000 awarded by the Federal Aviation Administration.

(vii) Licensees or applicants for a license under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.).

(3) All applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE program containing all the elements set forth in § 23.45. The program shall be submitted for approval to the DOT element concerned with the application for assistance or project approval.

(i) Applicants for Federal-aid highway program funds;

(ii) Applicants for funds in excess of $500,000, exclusive of transit vehicle purchases, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems;

(iii) Applicants for planning funds in excess of $200,000 under section 6, 8, 9 and 9A of the Urban Mass Transportation Act of 1964, as amended.

(iv) Applicants for funds in excess of $500,000 awarded by the Federal Aviation Administration to large, medium and small hub airports; and

(v) Applicants for financial assistance programs, including loan guarantees, by the Federal Railroad Administration and the U.S. Railway Association.

(b) *Approval requirement.* Applications and funding agreements are signed and authorizations to proceed are approved only after the applicant's MBE program has been approved by the Departmental element. This requirement applies to applications, authorizations to proceed requested by Federal-aid highway program recipients, and requests for draw downs from the U.S. Railway Association submitted 90 days or more following the effective date of this part.

(c) *Effect of agreement.* The MBE program prepared by the applicant and the commitment made by the applicant to carry out the MBE program is incorporated into and becomes part of this agreement and subsequent financial assistance agreements. The agreement between the Department and the recipient shall contractually bind the recipient to the

commitments made in the MBE program, as approved by the Department. Failure to keep these commitments shall be deemed noncompliance with this part. Once submitted and approved, an MBE program is applicable to all DOT-assisted contracts solicited and let by the applicant after the approval date of the MBE program regardless of the approval date of the grant or project under which the contracts are let.

(d) *Other MBE programs.* (1) applicants meeting the criteria set forth in paragraphs (a)(2) and (3) of this section who have formulated MBE programs under previous requirements of DOT or other agencies shall revise these programs to conform to the requirements of this part prior to the approval of their next application.

(2) An MBE program approved by one Departmental element is acceptable to all Departmental elements. Applicants having an approved MBE program are not required to resubmit the program or to produce a new program for future applications, as long as all requirements for approval continue to be met and implementation of the program is achieving compliance. The Departmental element reassesses its approval of the MBE program of continuing recipients at least annually.

(e) *Transit vehicle manufacturers.* Transit vehicle manufacturers who wish to bid on UMTA-assisted transit vehicle procurement contracts shall have a UMTA-approved MBE program. Each UMTA recipient shall require these manufacturers to certify that they have such a program as a condition for bidding on UMTA-assisted contracts.

(f) *Exemptions.* The head of the Departmental element may, under appropriate circumstances, and with the concurrence of the Secretary, grant deviations or exemptions from this subpart. A request for deviation or exemption from this subpart shall be in writing and shall include a showing as to how the particular situation is exceptional and how the modified program complies substantially with this part. If the applicant asserts that State or local law prohibits it from including a particular provision in its program, the applicant shall provide copies of all legal citations supporting the claim.

[45 FR 21184, Mar. 31, 1980, as amended at 48 FR 33444, July 21, 1983]

**§ 23.43 General requirements for recipients.**

(a) Each recipient shall agree to abide by the statements in paragraphs (a)(1) and (2) of this section. These statements shall be included in the recipient's DOT financial assistance agreement and in all subsequent agreements between the recipient and any subrecipient and in all subsequent DOT-assisted contracts between recipients or subrecipients and any contractor.

(1) *"Policy.* It is the policy of the Department of Transportation that minority business enterprises as defined in 49 CFR Part 23 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently, the MBE requirements of 49 CFR Part 23 apply to this agreement."

(2) *"MBE Obligation.* (i) The recipient or its contractor agrees to ensure that minority business enterprises as defined in 49 CFR Part 23 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard all recipients or contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. Recipients and their contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of DOT-assisted contracts."

(b) Each DOT financial assistance agreement shall include the following: "If as a condition of assistance the recipient has submitted and the Department has approved a minority business enterprise affirmative action program which the recipient agrees to carry out, this program is incorporated into this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the recipient of its failure to carry out the approved program the Department shall impose such sanctions as noted in 49 CFR Part 23, Subpart E, which sanctions may include termination of the agreement or other measure that may affect the ability of the recipient to obtain future DOT financial assistance."

(c) The recipient shall advise each subrecipient, contractor, or subcontractor that failure to carry out the requirements set forth in paragraph (a) of this section shall constitute a breach of contract and, after the notification of the Department, may result in termination of the agreement or contract by the recipient or such remedy as the recipient deems appropriate.

(d) Recipient shall take action concerning lessees as follows:

(1) Recipients shall not exclude MBEs from participation in business opportunities by entering into long-term, exclusive agreements with non-MBEs for the operation of major transportation-related activities or major activities for the provision of goods and services to the facility or to the public on the facility.

(2) Recipients required to submit affirmative action programs under §23.41(a)(2) or (a)(3) that have business opportunities for lessees shall submit to the Department for approval with their programs overall goals for the participation as lessees of firms owned and controlled by minorities and firms owned and controlled by women. These goals shall be for a specified period of time and shall be based on the factors listed in §23.45(g)(5). Recipients shall review these goals at least annually, and whenever the goals expire. The review shall analyze projected versus actual MBE participation during the period covered by the review and any changes in factual circumstances affecting the selection of goals. Following each review, the recipient shall submit new overall goals to the Department for approval. Recipients that fail to meet their goals for MBE lessees shall demonstrate to the Department in writing that they made reasonable efforts to meet the goals.

(3) Except as provided in this Section recipients are not required to include lessees in their affirmative action programs. Lessees themselves are not subject to the requirements of this part, except for the obligation of § 23.7 to avoid discrimination against MBEs.

**§23.45 Required MBE program components.**

(a) *A policy statement, expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible.* (1) The applicant's policymaking body (Board, Council, etc.) shall issue a policy statement, signed by the chairperson, which expresses its commitment to the program,

outlines the various levels of responsibility and states the objectives of the program. The policy statement shall be circulated throughout the applicant's organization and to minority, female, and nonminority community and business organizations.

(b) *The designation of liaison officer, as well as such support staff as may be necessary and proper to administer the program, and a description of the authority, responsibility, and duties of the liaison officer and support staff.* (1) The Chief Executive Officer of the recipient shall designate an MBE liaison officer and adequate staff to administer the MBE program. The MBE liaison officer shall report directly to the Chief Executive Officer.

(2) The MBE liaison officer shall be responsible for developing, managing, and implementing the MBE program on a day-to-day basis; for carrying out technical assistance activities for MBEs; and for disseminating information on available business opportunities so that MBEs are provided an equitable opportunity to bid on the applicant's contracts.

(c) *Procedures to ensure that MBEs have an equitable opportunity to compete for contracts and subcontracts.* The recipient shall develop and use affirmative action techniques to facilitate MBE participation in contracting activities. These techniques include:

(1) Arranging solicitations, time for presentation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation MBEs.

(2) Providing assistance to MBEs in overcoming barriers such as the inability to obtain bonding, financing, or technical assistance.

(3) Carrying out information and communications programs on contracting procedures and specific contracting opportunities in a timely manner, with such programs being bilingual where appropriate.

(d) *Opportunities for the use of banks owned and controlled by minorities or women.* (1) The recipient shall thoroughly investigate the full extent of services offered by banks owned and controlled by minorities or women in its community and make the greatest feasible use of these banks.

(2) Recipients shall also encourage prime contractors to use the services of banks owned and controlled by minorities or women.

(e) *MBE directory*. (1) The recipient shall have available a directory or source list to facilitate identifying MBEs with capabilities relevant to general contracting requirements and to particular solicitations. The recipient shall make the directory available to bidders and proposers in their efforts to meet the MBE requirements. It shall specify which firms the Department, recipient, or the Small Business Administration has determined to be eligible MBEs in accordance with procedures set forth in this subpart. Recipients subject to the disadvantaged business enterprise program requirements of Subpart D of this part shall compile and update their directories annually. The directors shall include the addresses of listed firms.

(f) *Procedures to ascertain the eligibility of MBEs and joint ventures involving MBEs*. (1) To ensure that its MBE program benefits only firms owned and controlled by minorities or women, the recipient shall certify the eligibility of MBEs and joint ventures involving MBEs that are named by the competitors in accordance with this subpart. Recipient may, at their own discretion, accept certifications made by other DOT recipients.

(2) Recipients shall require their prime contractors to make good faith efforts to replace an MBE subcontractor that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible MBEs.

(3) Recipients covered by the disadvantaged business program requirements of Subpart D of this part shall, in determining whether a firm is an eligible disadvantaged business enterprise, take at least the following steps:

(i) Perform an on-site visit to the offices of the firm and to any job sites on which the firm is working at the time of the eligibility investigation;

(ii) Obtain the resumes or work histories of the principal owners of the firm and personally interview these individuals;

(iii) Analyze the ownership of stock in the firm, if it is a corporation;

(iv) Analyze the bonding and financial capacity of the firm;

(v) Determine the work history of the firm, including contracts it has received and work it has completed;

(vi) Obtain or compile a list of equipment owned or available to the firm and the licenses of the firm and its key personnel to perform the work it seeks to do as part of the DBE program; and

(vii) Obtain a statement from the firm of the type of work it prefers to perform as part of DBE program.

(g) *Percentage goals for the dollar value of work to be awarded to MBEs.*

(1) Once the recipient has reviewed proposed contracting to identify those contracting activities which have the greatest potential for MBE participation, the recipient shall set goals that are practical and related to the potential availability of MBEs in desired areas of expertise.

(2) The applicant/recipient shall establish two types of MBE goals:

(i) Overall goals for its entire MBE program, for a specified period of time (e.g. one year), or for a specific project, (e.g. the construction of a facility); and

(ii) Contract goals on each specific prime contract with subcontracting possibilities, which the bidder or proposer must meet or exceed or demonstrate that it could not meet despite its best efforts.

(3) (i) Recipients shall submit their overall goals and a description of the methodology used in establishing them with their MBE program. When the overall goals expire, new overall goals shall be set and submitted to the Department for approval. Contract goals need not be submitted in the applicant's MBE program, but the program shall contain a description of the methodology to be used in establishing them. Contract goals may require approval by the Department prior to contract solicitation.

(ii) At the time the recipient submits its overall goals to the Department for approval, the recipient shall publish a notice announcing

these goals, informing the public that the goals and a description of how they were selected are available for inspection during normal business hours at the principal office of the recipient for 30 days following the date of the notice, and informing the public that the Department and the recipient will accept comments on the goals for 45 days from the date of the notice. The notice shall include addresses to which comments may be sent, and shall be published in general circulation media and available minority-focus media and trade association publications, and shall state that the comments are for informational purposes only.

(4) Recipients covered by the disadvantaged business enterprise program requirements of Subpart D of this part shall establish an overall goal and contract goal for firms owned and controlled by socially and economically disadvantaged individuals. Other recipients shall establish separate overall and contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively.

(5) The applicant shall consider the following factors in setting overall goals:

(i) Overall goals shall be based on projection of the number and types of contracts to be awarded by the applicant and a projection of the number and types of MBEs likely to be available to compete for contracts from the recipient over the period during which the goals will be in effect.

(ii) Overall goals shall also be based on past results of the applicant's/recipient's efforts to contract with MBEs and the reasons for the high or low level of those results.

(6) The applicant/recipient shall review the overall goals at least annually. The review process shall analyze projected versus actual MBE participation during the previous year. The necessary revisions shall be made based on the analysis and submitted to the Department for approval.

(7) Goals shall be set for specific contracts based on the known availability of qualified MBEs.

(8) Recipients and contractors shall, at a minimum, seek MBEs in the same geographic area in which they seek contractors or subcontractors generally for a given solicitation. If the recipient or

contractor cannot meet the goals using MBEs from this geographic area, the recipient or contractor, as part of its efforts to meet the goal, shall expand its search to a reasonable wider geographic area.

(h) *A means to ensure that competitors make good faith efforts to meet MBE contract goals.* (1) For all contracts for which contract goals have been established, the recipient shall, in the solicitation, inform competitors that the apparent successful competitor will be required to submit MBE participation information to the recipient and that the award of the contract will be conditioned upon satisfaction of the requirements established by the recipient pursuant to this subsection.

(i) The apparent successful competitor's submission shall include the following information:

(A) The names and addresses of MBE firms that will participate in the contract;

(B) A description of the work each named MBE firm will perform;

(C) The dollar amount of participation by each named MBE firm.

(ii) The recipient may select the time at which it requires MBE information to be submitted. *Provided*, that the time of submission shall be before the recipient commits itself to the performance of the contract by the apparent successful competitor.

(2) If the MBE participation submitted in response to paragraph (h)(1) of this section does not meet the MBE contract goals, the apparent successful competitor shall satisfy the recipient that the competitor has made good faith efforts to meet the goals.

(i) The recipient may prescribe other requirements of equal or greater effectiveness in lieu of goof faith efforts. Any recipient choosing alternative requirements shall inform the DOT office concerned by letter of the content of the requirements it has prescribed within 30 days of the effective date of this subsection. The recipient may put these alterative requirements into effect immediately and prior DOT approval of alternative requirements is not necessary.

(ii) If the Department determines that the alternative requirements are not as or more effective than the good faith efforts provisions of this subsection, the Department may require the recipient to use the good faith efforts requirements of this subsection instead of the requirements it has prescribed.

(3) Meeting MBE contract goals, making good faith efforts as provided in paragraph (h)(2) of his section, or meeting requirements established by recipients in lieu of good faith efforts, is a condition of receiving a DOT-assisted contract for which contract goals have been established.

(i) [Reserved]

(j) *A description of the methods by which the recipient will require subrecipients, contractors, and subcontractors to comply with applicable MBE requirements.* (1) The recipient shall include in its MBE program a description and the specific language of any preconditions to subgrants or contracts pertaining to the use of MBEs, including subcontracting programs, it awards with DOT funds in addition to those required by this section. It shall specify on what size and/or type of contracts and subgrants it includes such preconditions. The description shall contain a summary of the ways the recipient provides help to its subrecipients, contractors, and subcontractors in drafting and implementing their programs for using MBEs. The description shall also include the means by which the recipient enforces the requirements placed on subrecipients, contractors and subcontractors.

(2) Any MBE subcontracting programs required by the recipient in addition to those required by this section shall be submitted to the recipient by the apparent successful bidder/proposer. The bidders/ proposers shall be advised in the solicitation that failure to submit the additional MBE subcontracting program shall make the bidder/proposer ineligible for award.

(k) *Procedures by which the applicant/recipient will implement MBE set-asides.* Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE goals, procedures to implement MBE set-asides shall be established. MBE set-asides shall be used only in cases where at least three MBEs with capabilities consistent with contract requirements exist so as to permit competition.

* * *

## Subpart D - Implementation of Section 105(f) of the Surface Transportation Assistance Act of 1982

SOURCE: 48 FR 33442, July 21, 1983, unless otherwise noted.

### § 23.61 Purpose.

(a) The purpose of this subpart is to implement section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17) and section 105(f) of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223) so that, except to the extent the Secretary determines otherwise, not less than ten percent of the funds authorized by the Act for the programs listed in § 23.63 of this subpart is expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(b) The ten percent level of participation for disadvantaged businesses established by section 106(c) and section 105(f) will be achieved if recipient under the programs covered by this subpart set and meet overall disadvantaged business goals of at least ten percent.

[48 FR 33442, July 21, 1983, as amended at 52 FR 39230, Oct. 21, 1987; 53 FR 18286, May 23, 1988]

### § 23.62 Definitions.

The following definitions apply to this subpart. Where these definitions are inconsistent with the definitions of § 23.5 of this part, these definitions control for all other purposes under this part.

"*Act*" means the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17), with respect to financial assistance programs of the FHWA and UMTA, and the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223), with respect to FAA programs.

"*Disadvantaged business*" means a small business concern: (a) Which is at lest 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (b) whose management

and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

"*Small business concern*" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto except that a small business concern shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has annual average gross receipts in excess of $14 million over the previous three fiscal years. The Secretary shall adjust this figure from time to time for inflation.

"*Socially and economically disadvantaged individuals*" means those individuals who are citizens of the Untied States (or lawfully admitted permanent residents) and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section 8(a) of the Small Business Act. Recipients shall make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged. Recipients also may determine, on a case-by-case basis, that individuals who are not a member of one of the following groups are socially and economically disadvantaged.

(a) "*Black Americans*," which includes persons having origins in any of the Black racial groups of Africa;

(b) "*Hispanic Americans*," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(c) "*Native Americans*", which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(d) "*Asian-Pacific Americans*," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas; and

(e) "*Asian-Indian Americans*," which includes persons whose origins are from India, Pakistan, and Bangladesh.

[48 FR 33442, July 21, 1983, as amended at 52 FR 39230, Oct. 21, 1987; 53 FR 18286, May 23, 1988]

**§ 23.63 Applicability.**

This subpart applies to all DOT financial assistance in the following categories that recipients expend in DOT-assisted contracts:

(a) Federal-aid highway funds authorized by Title I of the Act;

(b) Urban mass transportation funds authorized by Title I or III of the Act or the Urban Mass Transportation Act of 1964, as amended, ;and

(c) Funds authorized by Title I, II (except section 203) or III of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424) and obligated on or after April 2, 1987.

(d) Funds authorized under section Title I of the Airport and Airway Safety and Capacity Expansion Act of 1987 (Pub. L. 100-223).

[52 FR 39231, Oct. 21, 1987, as amended at 53 FR 18286, May 23, 1988]

**§ 23.64 Submission of overall goals.**

(a) Each recipient funds to which this subpart applies that is required to have an MBE program under § 23.41 of this part shall establish an overall goal for the use of disadvantaged businesses.

(b) Each recipient required to establish an overall goal shall calculate it in terms of a percentage of one of the following bases, as applicable:

(1) For recipients of Federal-aid highway funds, all such funds that the recipient will expend in DOT-assisted contracts in the forthcoming fiscal year; or

(2) For recipients of urban mass transportation or airport funds, all such funds (exclusive of funds to be expended for purchases of transit

vehicles) that the recipient will expend in DOT-assisted contracts in the forth coming fiscal year. In appropriate cases, the UMTA or FAA Administrator may permit recipients to express overall goals as a percentage of funds for a particular grant, project, or group of grants and/or projects.

(c) Each recipient of Federal-aid highway funds, urban mass transportation funds, or airport funds shall submit its overall goal to FHWA or UMTA or FAA, as appropriate, for approval 60 days before the beginning of the Federal fiscal year to which the goal applies. An UMTA or FAA recipient calculating its overall goal as a percentage of funds for a particular grant, project, or group of grants or projects shall submit its overall goal to UMTA or FAA at a time determined by the UMTA or FAA Administrator.

(d) Recipients submitting a goal of ten percent or more shall submit the goal under the procedures set forth in § 23.45(g) of this part.

(3) If an FHWA or UMTA or FAA recipient requests approval of an overall goal of less than ten percent, the recipient shall take the following steps in addition to those set forth in § 23.45(g) of this part:

(1) Submit with its request a justification including the elements set forth in § 23.65;

(2) Ensure that the request is signed, or concurred in, by the Governor of the state (in the case of a state transportation agency), the Mayor or other elected official(s) responsible for the operation of a mass transit agency; or, with respect to an airport sponsor, the elected official, head of the board, or other official responsible for the operation of the sponsor, and

(3) Consult with minority and general contractors' associations, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses. If it appears to the Administrator that the recipient has failed to consult with a relevant person or organization, the Administrator may direct the recipient to consult with that person or organization.

[48 FR 33442, July 21, 1983, as amended at 53 FR 18286, May 23, 1988]

**§ 23.65 Content of justification.**

An FHWA or UMTA or FAA recipient requesting approval of an overall goal of less than ten percent shall include information on the following points in its justification. Guidance concerning this information is found in Appendix D.

(a) The recipient's efforts to locate disadvantaged businesses;

(b) The recipient's efforts to make disadvantaged businesses aware of contracting opportunities;

(c) The recipient's initiatives to encourage and develop disadvantaged businesses;

(d) Legal or other barriers impeding the participation of disadvantaged businesses at at least a ten percent level in the recipient's DOT-assisted contracts, and the recipient's efforts to overcome or mitigate the effects of these barriers;

(e) The availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts;

(f) The size and other characteristics of the minority population of the recipient's jurisdiction, and the relevance of these factors to the availability or potential availability of disadvantaged businesses to work on the recipient's DOT-assisted contracts; and

(g) A summary of the views and information concerning the availability of disadvantaged businesses and the adequacy of the recipient's efforts to increase the participation of such businesses provided by the persons and organizations consulted by the recipient under § 23.64(f)(3).

[48 FR 33442, July 21, 1983, as amended at 53 FR 18286, May 23, 1988]

**§ 23.66 Approval and disapproval of overall goals.**

(a) The Administrator reviews and approves any overall goal of ten percent or more submitted by a recipient as provided in § 23.45(g) of this part.

(b) The Administrator of the concerned Departmental element approves a requested goal of less than ten percent if he or she determines, on the basis of the recipient's justification and any other information available to the Administrator, that

(1) The recipient is making all appropriate efforts to increase disadvantaged business participation in its DOT-assisted contracts to a ten percent level; and

(2) Despite the recipient's efforts, the recipient's requested goal represents a reasonable expectation for the participation of disadvantaged businesses in its DOT-assisted contracts, given the availability of disadvantaged businesses to work on these contracts.

(c) Before approving or disapproving a requested goal of less then ten percent, the Administrator provides the Director of the DOT Office of Small And Disadvantaged Business Utilization with an opportunity to review and comment on the request.

(d) If the Administrator does not approve the goal the recipient has requested, the Administrator, after consulting with the recipient, establishes an adjusted overall goal. The adjusted overall goal represents the Administrator's determination of a reasonable expectation for the participation of disadvantaged businesses in the recipients DOT-assisted contracts, and is based on the information provided by the recipient and/or other information available to the Administrator.

(e) The Administrator may condition the approval or establishment of any overall goal on any reasonable future action by the recipient.

* * *

Supreme Court, U.S.
FILED
MAR 16 1993
OFFICE OF THE CLERK

# 92-No. 1379

# In The Supreme Court Of The United States

**OCTOBER TERM, 1992**

**MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al.,**

*Petitioners,*

v.

**THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TRANSPORTATION, in his official capacity, et al.,**

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

**Michael E. Kennedy**
**Associated General Contractors of America, Inc.**
**1957 E. Street, N.W.**
**Washington, DC 20006**
**(202) 393-2040**

*Of Counsel*

**Walter H. Ryland***
**Williams, Mullen, Christian, Dobbins, P.C.**
**Two James Center**
**1021 East Cary Street**
**P.O. Box 1320**
**Richmond, VA 23210-1320**
**(804) 783-6415**

*Attorney for Amicus Curiae*

*Counsel of Record

**March 18, 1993**

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

## QUESTIONS PRESENTED FOR REVIEW

Whether a state must first ascertain the nature and scope of past discrimination against members of racial minority groups before adopting a race-based preference program which sets aside funds for members of such minority groups in excess of the "not less than 10%" directed by the Surface Transportation and Uniform Relocation Assistance Act of 1987.

Whether one seeking to challenge a governmental policy allocating specified highway contracts or parts thereof to businesses owned by members of racial minority groups can establish standing under Article III by showing that the policy excludes bids of non-minorities from consideration.

## TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW . . . . . i

TABLE OF CONTENTS . . . . . ii

TABLE OF AUTHORITIES . . . . . iii

INTEREST OF THE AMICUS . . . . . 1

STATEMENT . . . . . 3

REASONS FOR ALLOWANCE OF THE WRIT . . . 7

I A state must first ascertain the nature and scope of past discrimination against members of racial minority groups before adopting a race-based preference program, which sets aside funds for members of such minority groups in excess of the "not less than 10%" directed by the Surface Transportation and Uniform Relocation Assistance Act of 1987. . . . . 7

II Whether one seeking to challenge a governmental policy allocating specified highway contracts or parts

thereof to businesses owned by members of racial minority groups can establish standing under Article III by showing that the policy excludes non-minority bids from consideration?. . . . . 16

CONCLUSION . . . . . 21

## TABLE OF AUTHORITIES


Cases — Page

*Allen v. Wright*, 468 U.S. 737 (1984) . . . . . 20

*Babbitt v. Farm Workers*, 442 U.S. 289 (1979) . 20, 21

*CC Distributors v. United States*, 833 F.2d 1216 (D.C. Cir. 1989) . . . . . 18

*Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988) . . . . . 17

*City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). . . . . 6, 8, 9, 12

*Cone Corp. v. Hillsborough County* 908 F. 2d 908 (11th Cir. 1990), *cert. denied,* 114 L. Ed 2d 479 (1991). . . . . 13

*Cone Corp. v. Fla. Dept. of Transportation*, 921 F.2d 1190 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2238 (1991). . . . . 17

*Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir.), *cert. denied*, ___ U.S. ___ 112 S.Ct. 875 (1992). . . . . 19

*DeBartolo Corp. v. Florida Gulf Trades Comm'n, 485 U.S. 568 (1988)* . . . . . 14

*DKT Memorial Fund Ltd. v. Agency for Int'l Development*, 887 F.2d 275 (D.C. Cir. 1989) 18

*Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368 (1981) . . . . . 17

*Fullilove v. Klutznick*, 448 U.S. 448 (1980) . . . . . 6, 8, 9, 10, 13

*Harrison & Burrowes Bridge Construction, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992) . . . . 16

*H. K. Porter Company, Inc. v. Metropolitan Dade County*, 825 F.2d 327 (11th Cir. 1987), *vacated* 489 U.S. 1062 (1989), *rev'd* 975 F.2d 762 (1992) . . . . . 11, 12, 13

*International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). . . . . 19

*Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) . . . . . 8, 9, 10, 11, 12

*Michigan Road Builders Ass'n, Inc v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd* 109 S.Ct. 1333 (1989) . . . . . 5

*Milwaukee Pavers' Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) . . . . . 11, 13

*NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979) . . . . . 13

*Northeastern Florida Chapter v. City of Jacksonville*, 951 F.2d 1217 (11th Cir. 1992) *cert granted* No. 91-1721 . . . . . 17,18

*O'Donnell Construction Company v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992)* 10, 19

Pennell v. City of San Jose, 485 U.S. 1 (1988). . . . 20

*Planned Parenthood Ass'n of Chicago v. Keminers*, 700 F.2d 1115 (7th Cir. 1983) . . . . . 18

*Public Citizen v. United States*, 491 U.S. 440 (1989) . 14

*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) . . . . . 18

*Shelley v. Kraemer*, 334 U.S. 1 (1948) . . . . . 16

*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) . . 18

*Warth v. Seldin*, 422 U.S. 490, 501 (1975). . . . . 17

*West Virginia Ass'n of Community Health Centers v. Keminers*, 700 F.2d 1115 (7th Cir. 1983) . 18

Constitution of the United States

Amendment XIV § 1 . . . . . 13
§ 5 . . . . . 13

Regulations

49 CFR 23.64(d) . . . . . 9

Statutes

Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, 101 Stat 132 . . . . . 5, 8, 12, 13, 14, 15, 16

Surface Transportation Assistance Act, 96 Stat. 2097 (1983) (STAA) . . . . . 5

Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), P.L. 102-240, 105 Stat. 1914 . . . . . 5, 8, 15

Other

House Conference Report No. 100-27, 1987 U.S. Code Cong. & Admin. News, 133 . . . . . 14

Congressional Record, October 23, 1991, p. 1710 . . 15

No. 92-1379

# IN THE SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1992

---

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., *et al.*,

Petitioners,

v.

THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TRANSPORTATION, in his capacity, *et al.*

Respondents.

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## BRIEF FOR THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

---

The Associated General Contractors of America, Inc., with the written consent of the parties, submits this brief as Amicus Curiae in support of the petitioners. The letters of consent have been filed separately herewith.

## INTEREST OF THE AMICUS CURIAE

The Associated General Contractors of America, Inc. ("AGC") is a private, non-profit trade association founded in 1918 to represent the national interests of general construction contractors. Approximately 8,000 of the leading firms engaged in general contracting are among the association's approximately 33,000 members. Among other things, these firms construct highways, bridges, buildings, industrial facilities, and municipal utilities.

AGC has 100 state and local chapters throughout the United States, with at least one chapter serving each state, and one chapter in Puerto Rico. The Michigan Road Builders Association is one of three AGC Chapters int he State of Michigan, and like many other AGC members, its members perform a substantial amount of public works.

AGC and its chapters therefore have a great interest in government contracting policies and procedures. When necessary, AGC and its chapters turn to the courts for assistance with related issues. Several AGC chapters have brought cases similar to this one. AGC has most recently participated in this Court's proceedings as amicus curiae in *Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Massachusetts/Rhode Island*, Nos. 91-261 and 91-274, and as *amicus curiae* in a case brought by another AGC Chapter, *Northeastern Florida Chapter of the Associated General Contractors of American v. City of Jacksonville, Florida*, No. 91-1721.

AGC's longstanding policy is to support open competitive bidding for public construction contracts. The purposes of competitive bidding and AGC's related policy are "to give all persons equal rights to compete for Government contracts; to prevent unjust favoritism, collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." *United States v. Brookridge Farm*, 111 F.2d 461, 463 (10th Cir. 1940).

AGC is concerned that the Sixth Circuit's opinion will encourage states and localities to resort to race-based preferences whenever and merely because minority firms are available to do the work. This case impinges on one of the deepest concerns of an industry committed to equal opportunity but heavily burdened by government requirements politically for attractive results.

## STATEMENT OF THE CASE

The *amicus* adopts Petitioners' Statement of the Case, but emphasizes the following.

This action was commenced on May 8, 1990 by the Michigan Road Builders Association, Inc. (hereinafter "MRBA" or Petitioners) seeking declaratory relief and an injunction against the continued enforcement of policies adopted by the Michigan State Transportation Commission (hereinafter the "Commission"). These policies exclude 95% of MRBA's 120 members, who perform 75% of the total dollar value of all state highway construction contracts, from bidding on selected highway construction contracts let by the Michigan Department of Transportation

(hereinafter "MDOT") because of the members' race, ethnic origin, and gender.

Specifically, the Commission adopted a policy requiring fifteen percent (15%) of the dollar amount of all federal-aid highway funds awarded or administered by MDOT to be expended with disadvantaged business enterprises (DBE's), minority business enterprises (MBE's), women business enterprises (WBE's), and handicapped-owned businesses (HBO's).

The Commission also mandated the use of "prime contract set-asides" which expressly limited consideration of bids or proposals to those submitted by DBE/MBE/WBE/HBO firms. The policy sets forth the reasons for adoption of these set-asides:

> Recognizing the department's commitment to DBEs/MBEs/WBEs/HBOs and recognizing that inequities have limited DBEs/MBEs/WBEs/HBOs in their ability to obtain adequate working capital, bonding and prerequisite experience necessary to be competitive, a set-aside technique will be used by the department. The set-aside technique, included in the regular lettings, will be used to meet the overall goals and to provide construction services and procurement opportunities for DBEs/MBEs/WBEs/HBOs. Participation in set-aside contracts will provide firms the opportunity to gain experience in the transportation industry.

The policy authorizes no waiver provisions. Neither the goal nor the identification of which contracts are to be set-aside can be questioned.

The Commission adopted this policy, including the 15% goal, on February 24, 1988, the day after the Sixth Circuit Court of Appeals denied the State's Motion for Rehearing and Rehearing En Banc in *Michigan Road Builders Association v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 109 S.Ct. 1333, 103 L.Ed.2d 804 (1989), where the court had held that a Michigan statute setting aside 7% of the State's discretionary expenditures for MBE's, and 5% for WBE's, was unconstitutional because the State had no evidence of prior discrimination in its highway construction industry.

The regulation at issue has been long-lived. It appears in the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), which was a successor to the Surface Transportation Assistance Act (STAA), enacted in 1983. Although under STURAA the regulation expired in 1992, it was readopted and remains in effect under the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA). The principal difference is that STURAA and ISTEA include women-owned businesses on DBE's.

The court first held that neither MRBA nor any of the individual contractors had standing to maintain the action.

Notwithstanding its holding that Petitioners lacked standing, the district court went on to determine the case on the merits. The court held that Congress intended the

STURAA, to authorize the commission to require "the maximum level of DBE participation possible" and to use the set aside to assure attainment of that goal.

On appeal, in an unpublished opinion the Sixth Circuit Court of Appeals affirmed the district court's judgment against Petitioners, adopting the district court's decision of the case on the merits as the basis for its decision to affirm the judgment. App. at 1-2. The Sixth Circuit stated that:

> While the panel differs with some of the conclusions of the district court concerning lack of standing, we nevertheless agree with the court's reasoning concerning the merits of the claims brought by plaintiffs, and therefore adopt that reasoning as set out by the court in its opinion of April 11, 1991. Under the circumstances of this case, resolution of the appeal is governed by the Supreme Court's opinion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), rather than by the opinion released in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

## SUMMARY OF ARGUMENT

The Sixth Circuit failed to apply this Court's rulings defining the parameters of Congress' authority to authorize states to enact race preferences as a remedy for discrimination. Specifically, the Sixth Circuit disregarded this Court's basic premise that racial preferences may influence the award of public contracts, if at all, then only for demonstrably remedial purposes. In the absence of any

Congressional mandate to remedy discrimination under § 5 of the Fourteenth Amendment, the state cannot adopt a preferential program without a record that satisfies the Croson requirements.

If this Court determines to review the issues regarding standing, then it is submitted that the test to be imposed on petitioners is whether their pleadings and evidence establish a realistic danger of sustaining a direct injury as a result of the challenged program's operation or enforcement.

## REASONS FOR ALLOWANCE OF THE WRIT

THIS COURT SHOULD GRANT THE WRIT BECAUSE THE DECISION OF THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, AND OTHER CIRCUITS HAVE REACHED CONFLICTING DECISIONS.

## ARGUMENT I

A state must first ascertain the nature and scope of past discrimination against members of racial minority groups before adopting a race-based preference program which sets aside funds for members of such minority groups in excess of the "not less than 10%" directed by the Surface Transportation

and Uniform Relocation Assistance Act of 1987.

Petitioners' position is that a state in adopting goals and set-asides in excess of the 10% figure approved in STURAA and ISTEA must satisfy the requirements of *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) that the record demonstrate that the state actor has a firm basis for concluding that additional measures are needed to remedy identified discrimination and that its actions are narrowly tailored to the remedial objective.

The Sixth Circuit concluded that since the program involved was a federal program governed by *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and since the state complied with the applicable federal regulations in increasing the goals, the increased goals were acceptable without further need to demonstrate a remedial purpose. The District Court interpreted *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) as applying the *Fullilove* rationale to any program approved by Congress. 761 F. Supp. at 1314. The Court in effect construed the statute to permit racial preferences limited only by the capacity of minority business to do the work.

However, under *Fullilove* whether a preference enacted by congress will pass muster is still dependent on whether the preference is remedial and narrowly tailored. 448 U.S. at 480 ( Burger, C.J.) While in *Fullilove* the Court upheld the facial validity of a 10% goal, the case involved no suggestion of any circumstances in which a state could adopt a goal in excess of that amount.

The Sixth Circuit's rote application of *Fullilove* and *Metro Broadcasting* fails on two points: (1) it misconstrued *Fullilove* to establish the standard of review of wholly autonomous state action and (2) the statutory language does not support the court's construction that the "not less than" 10% language allows "a state recipient of federal funds to set a goal of more than 10%. *See* 49 C.F.R. § 23.64(d)." 761 F.Supp. 1303, 1314-15.

### *1. Review of State Action*

The issue concerned here is the level of scrutiny to be applied to state action that relates to a federal program but goes beyond anything that congress has sought to authorize.

The inquiry required by strict scrutiny is set out in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). In *Metro Broadcasting,* Justice O'Conner cited *Croson* for the proposition that strict scrutiny also applies to federal programs. [T]he Constitution requires that the court apply a strict standard of scrutiny to evaluate racial classifications..." *Metro Broadcasting*, 497 U.S. at 603 (O'Conner, J. dissenting).

Nevertheless, the central question is whether Congress provided a sufficiently precise mandate for this court to conclude that the racial preference embodied in the MDOT program was the product of congressional, rather than state, judgment. Given the suspect nature of racial classifications, federal legislation cannot be said to direct their use unless Congress itself makes the "critical determinations" necessary to define the race-based program. *Fullilove v. Klutznick*, 448 U.S. 448, 468 (1980) (Burger,

C.J.) . See *O'Donnell Construction Company v. District of Columbia*, 963 F.2d 420, 423, (D.C. Cir., 1992) (Congressional oversight of the District of Columbia did not transform the D.C. Council's action unto congressional legislation designed to enforce the Fourteenth Amendment.)

Initially, *Fullilove* makes it clear that congressional involvement in a racially preferential program does not foreclose judicial review:

> Here we pass not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny, and it "is not to say that we 'defer' to the judgment of congress. . . on a constitutional question. . ."

448 U.S. at 473 (Burger, C.J.) Nothing in *Metro Broadcasting* is to the contrary, and that case is distinguishable on its facts. Strict scrutiny of the challenged state action need not implicate this court's ruling in *Metro Broadcasting,* which involved the standard of review for a federal policy which congress had unambiguously endorsed and approved. In this case, the need for a state to increase its goals or mandate set-asides for remedial purposes was never identified by the Congress, MDOT, or any federal official.

In *Metro Broadcasting* the majority based its holding on the fact that the program at issue was specifically approved by congress:

> "It is of overriding significance in these cases that FCC's minority ownership programs have been specifically approved--indeed mandated--by Congress.

497 U.S. at 563. The majority expressly based its decision on the fact the specific programs at issue had been "mandated" by the Congress.

> "We hold that benign race-conscious measures mandated by congress--even if those measures are not "remedial" in the sense of being designated to compensate victims of past governmental or societal discrimination--are constitutionally permissible to the extent that they serve important governmental objectives..."

497 U.S. at 564-65.

In cases where Congress has not made the critical determinations, or the State has exceeded the federal parameters, a number of other circuits have held that the action by a state to increase the goals had to independently justify race-based action. *H. K. Porter Co. v. Metropolitan Dade County*, 975 F. 2d 762 (11th Cir. 1992); *Milwaukee Pavers' Association v. Fiedler*, 922 F. 2d 419 (7th Cir. 1991), *cert. denied* ___ U.S. ___ , 114 L. Ed.2d 714 (1991).

In *H. K. Porter Company, Inc. v. Metropolitan Dade County*, 489 U.S. 1062 (1989) this Court vacated a judgment of the Eleventh Circuit Court of Appeals that had rejected a challenge to local action under a federal MBE

program. The Supreme Court remanded the case "for further consideration in light of *City of Richmond v. J.A. Croson Company*". *H.K. Porter* teaches that, even though Congressionally authorized spending is involved, judicial review as to constitutional compliance is necessary and not limited to issues of federal authority purportedly delegated to state and local recipients.

On remand the Court of appeals distinguised *Metro Broadcasting* on grounds that it involved programs that were "specifically approved - indeed, mandated - by Congress", and found no federal mandate for the State action. *H. K. Porter,* 975 F.2d 762, 765 (11th Cir. 1992) (petition for rehearing pending).

The question, of course, is how precise the federal mandate must be before it can cloak racial discrimination with federal approval. Federal appellate cases establish two specific requirements.

First, Congress itself must define the scope of the preferential program. If Congress fails to define the extent of the program, the implementing agency must exercise its discretion and fill the gap. In such a case, the program reflects the judgment of the agency rather than Congress, and the agency must independently establish the constitutionality of the program.

This principle has been enunciated most clearly in the context of federal aid to state highway construction programs. STURAA requires that 10% of federal highway aid be expended with firms owned and controlled by minorities or women. Pub. L. 100-17, §106(c), 101 Stat. 132, 145 (1987). If a state seeks to attach similar require-

ments to state expenditures for highway construction beyond the 10% set-aside required by Congress, it cannot to that extent claim a congressional mandate. The state's program must stand or fall on its own merits. *Milwaukee Pavers' Ass'n v. Fiedler*, 922 F. 2d 419, 424-425 (7th Cir. 1991), *cert. denied*, 111 S.Ct. 2261 (1991). Indeed, in *Cone Corp. v. Hillsborough County*, 908 F. 2d 908 (11th Cir. 1990), *cert. denied*, 114 L.Ed.2d 479 (1991), the fact that the county had to independently justify its race-based contracting program after it expanded the program beyond the scope of the congressional mandate was not even questioned. *See also, H.K. Porter Co., supra,* at 765-766 (holding that Congress had not mandated a minority set-aside program where the relevant legislation did not "dictate a specific percentage set-aside" for minorities). *Fullilove, supra*, at 468 (enumerating "the specification of a minimum level for minority business participation" as a "critical factor" determined by Congress).

### 2. *Statutory Construction*

The initial error by the lower courts is the finding that STURAA had authorized adoption of a DBE goal greater than 10%. There is nothing on the face of the statute to compel that conclusion, and no legislative history indicates the existence of any such authorization. A contrary construction of the statute is not only in accord with the intent of congress but also avoids the need for searching constitutional inquiry into the relationship between sections 5 and 1 of the Fourteenth Amendment and, in turn, the power of congress to authorize limitless racial preferences. *NLRB v The Catholic Bishop of Chica-*

*go*, 440 U.S. 490 (1979); *Public Citizen v. United States*, 491 U.S. 440 (1989); *DeBartolo Corp. v. Florida Gulf Trades Comm'n*, 485 U.S. 568 (1988).

One of the changes made by STURAA to the 1982 authorizing act was the addition of Women Business Enterprises as DBEs. Notwithstanding the addition of this group, the Secretary of Transportation was directed not to:

> . . . increase the overall 10 percent DBE requirement set by this section as a result of the inclusion of WBEs as a presumptive group.

House Conference Report No. 100-27, 100th Cong. First Session, Mar. 18, 1987, p. 148; 1987 U.S. Code Cong. & Admin. News, 133.

Congress was clearly not mandating that MDOT should adopt as a goal the "maximum level of DBE participation possible." In fact, since Congress was the body which determined what discrimination existed in the highway construction industry and what level of remediation was required to remove the effects of the past discrimination, it is clear that a goal in excess of 10% was viewed as not necessary to the achievement of that objective. Id.

Congress not only did not mandate a requirement that states adopt goals in excess of 10%, but it mandated that the goal remain at 10% notwithstanding the significant expansion of the preferred class. Any contention that STURAA mandates goals in excess of 10% is clearly erroneous.

In addition, during debate over the current federal highway aid authorization bill (ISTEA) an amendment was offered in the House of Representatives to increase STURAA's set-aside by providing 10% for DBEs, which would no longer include women-owned businesses, and a separate 5% for WBEs, for an overall goal of 15%. The amendment was defeated. "Congressional Record," October 23, 1991 at 1710.

The Court placed great emphasis on the "not less than" language of STURAA. However, if Congress had fixed the maximum goal in stone at 10%, then a state which had made independent findings of discrimination in its contracting procedures would be prohibited from adopting any remedial policy involving federally funded projects which exceeded 10%, regardless of its compelling interest. That is why Congress used the "not less than 10%" language. Ten percent would remedy Congress' findings, and states would not be prohibited from utilizing federal funds to remedy other discrimination. A state that wishes to set a higher goal for a compelling governmental interest is permitted, but not required, to do so.

The only construction of STURAA is that Congress made findings of past discrimination in the highway construction industry and concluded that, if 10% of the funds appropriated for highway construction were expended with DBEs, the present effects of such past discrimination would be eliminated. If Congress had intended to authorize states to adopt goals higher than 10%, it could have easily done so in clear and concise language.

The rule adopted by the Sixth Circuit would just as easily permit MDOT to adopt any DBE goal between 10%

and 100% so long as there was an available pool of "certified" DBEs to do the type of work required by MDOT. (A similar result was reached recently in *Harrison & Burrowes Bridge Construction, Incorporated v. Cuomo*, 981 F.2d 50 (2d cir., 1992) Such a rule is no rule at all in operation because it permits constantly increasing DBE goals with no concern for their impact on the non-preferred groups. That does violence to the Supreme Court's command that the rights guaranteed by Section 1 of the Fourteenth Amendment are "guaranteed to the individual" and "are personal rights", *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

This Court should rule that STURAA does not empower states to increase the goals or adopt set-asides without a proper showing that it is enacting a narrowly tailored remedy for identified discrimination.

## ARGUMENT II

> Whether one seeking to challenge a governmental policy allocating specified highway contracts or parts thereof to businesses owned by members of racial minority groups can establish standing under Article III by showing that the policy excludes non-minority bids from consideration?

The Court of Appeals apparently agreed that Petitioners' had standing. It noted that it "differs with some of the conclusions of the district court concerning lack of standing," App. at 1, and went on to the merits. No cross-petition on standing has been noted. The court would lack

jurisdiction to consider the merits if standing were lacking. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 818 (1988), 870 F.2d 1292 (7th Cir. 1989), *cert. denied*, 493 U.S. 822 (1989); *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

However, since this Court is not required to accept the lower court's rulings on standing, and Petitioners have requested review of the issue, the following is offered in support of the Petitioners.

Unlike the situation in *Northeastern Florida Chapter Associated General Contractors of America v. City of Jacksonville* (No. 91-1721) in which the issue was whether standing was properly pled, in this case there was testimony at trial. Both cases adopted a mechanical test requiring a plaintiff to seek to bid on a contract before challenging the exclusion from biddings.

The findings of fact, noted that Petitioners perform 75% of the value of state contracts, and that the association's executive director testified that Petitioners members desired to bid on set-aside contracts but were excluded. A non-minority witness who fabricated traffic control signs testified that had he been permitted, he would have bid on two projects that were set aside. 761 F.2d at 1306

The district court cited the *Cone Corp. v. Florida Department of Transportation*, 921 F.2d 1190 (11th Cir. 1980), the precursor of the *City of Jacksonville* case, as adopting a mechanical rule that *Warth v. Seldin*, 422 U.S. 490 (1975) and other cases required that the contractor

actually apply for certification as a DBE. Testimony showed that no white firm has been certified as a DBE. *Id.* at 1308. In addition the court held the witness should have been on the contract from which he was excluded. *Id.* at 1310. Petitioner correctly notes that it would be futile for the witness to have attempted to apply for certification on a DBE because he was white and not disadvantaged.

In numerous cases in which the plaintiff was completely precluded from consideration for benefits for which it would otherwise be eligible, the courts have found Article III standing to be present regardless of whether the plaintiff actually went through the futile gesture of applying for benefits from which it was precluded. *See, Regents of the University of California v. Bakke*, 438 U.S. 265, 280-281, N. 14 (constitutional injury in fact requirement satisfied merely by denial of opportunity to compete for place in class based on race); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (exclusion from opportunity to obtain housing sufficient to confer standing despite failure to apply for housing); *CC Distributors, Inc. v. United States*, 833 F.2d 146, 149-150 (D.C. Cir. 1989) (denial of opportunity to compete is sufficient injury to confer standing); *DKT Memorial Fund Ltd. v. Agency for Int'l Development*, 691 F.Supp. 394, 397-98 (D.D.C. 1988), *aff'd in part, rev'd in part on other grounds*, 887 F.2d 275 (D.C. Cir. 1989) (standing upheld based on exclusion from funding despite no application for funding); *W. Va. Ass'n of Com. Health Centers v. Heckler*, 734 F.2d 1570, 1574-75 (4th Cir. 1984) (standing found based simply on denial of opportunity to compete for funding); *Planned Parenthood Ass'n of Chicago v. Keminers*, 700 F.2d 1115, 1118-20 (7th Cir.

1983) (standing satisfied where statute prevented plaintiff from competing freely for funds).

Moreover, the Sixth Circuit's decision is in conflict with other courts of appeal that have considered standing in cases involving set asides. In *Coral Construction v. King County*, 941 F.2d 910, 929-30 (9th Cir. 1991), the Defendants' policy entitled WBE's to an automatic five percent (5%) competitive advantage over non-WBE contracting terms. The Court found that plaintiffs had standing to challenge the program because it contained an "objectively unequal bidding process." *Id.* at 22. In other words, the court found a concrete injury in fact to exist simply because "majority contractors did not enjoy an equal playing field for contracts awarded under the set-aside method." *Id.* at 21. Depriving the plaintiff of an equal opportunity to bid was held sufficient to confer standing in *O'Donnell Construction Company v. District of Columbia* 963 F.2d 420, 423 (D.C. Cir. 1992.)

In the present case, as in *Coral Construction*, MDOT's policy contains an objectively unequal bidding process. Plaintiffs do not enjoy an equal playing field because the Defendants set aside a portion of their contracts for DBE/MBE and WBE bidders only; non-DBE/MBE and WBE firms are precluded from having their bids considered at all. Thus, as in *Coral Construction, Bakke,* and the numerous other cases cited above, the Plaintiffs herein have suffered a concrete injury in fact based on their exclusion from the bidding process. As in the other cases, a futile application is not necessary. *See, Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977).

Standing for the purpose of a facial challenge to a law can be established by showing that the ordinance will be enforced against the plaintiff and there is a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988).

Writing for the Court, the Chief Justice noted that "application of the constitutional standing requirement [is not] a mechanical exercise." *Id.* at 7, citing *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Chief Justice concluded that the likelihood that the ordinance would be enforced to the disadvantage of the Association's members "is a sufficient threat of actual injury to satisfy Article III's requirement that '[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 708, citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

Here, the MRBA testified that it is excluded from competing for contracts on the basis of race. That is an injury in fact. Moreover, the sheer volume of business done by Petitioners' members makes it clear that there was a "realistic danger" of sustaining a direct injury as a result of the statute's operation or enforcement.

In *Babbitt, supra*, 442 U.S. 299, it was held that where the challenged election procedures would burden freedom of Association it was not necessary to first seek to invoke the procedures in order to have standing. The argument in *Babbitt* was much like that of the Sixth Circuit to establish standing to sue for the relief requested: delaying adjudication until plaintiffs invoke the election

procedures might mean a better factual record. 442 U.S. at 300. However the testimony was adequate.

> We are persuaded however that awaiting appellees' participation in an election would not assist our resolution of the threshold operation whether the election procedures are subject to scrutiny under the First Amendment at all.

*Id.*, 442 U.S. at 301.

the certainty of enforcement and "the total likelihood that it would result in the exclusion of some Petitioners from bidding is sufficient to confer standing.

## CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be granted.

Associated General Contractors of America, Inc.,
*Amicus Curiae*.

By s/ Walter H. Ryland

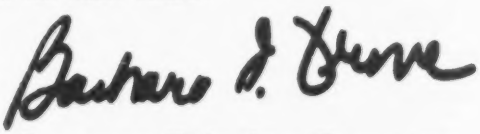
Walter H. Ryland, Esquire
Williams, Mullen, Christian
& Dobbins
Two James Center
1021 East Cary Street
P.O. Box 1320
Richmond, VA 23210-1320
(804) 783-6415
*Attorney for Amicus Curiae*

Michael E. Kennedy, Esquire
Associated General Contractors
of America, Inc.
1957 E. Street, N.W.
Washington, D.C. 20006
(202) 393-2040
*Of Counsel*

## MAILING CERTIFICATE

I hereby certify that on this 18th day of March 1993, I filed via certified mail 40 copies of the Brief Amicus Curiae with the Clerk's Office of the Supreme Court of the United States.

The necessary filing and mailing was performed in accordance with the instructions given me by counsel in this case.



Lawyers Printing Company
Suite B-115
7th & Franklin Building
Richmond, Virginia 23219

# OPPOSITION

# BRIEF

No. 92-1379

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

Supreme Court, U.S.
FILED
MAR 19 1993
OFFICE OF THE CLERK

MICHIGAN ROAD BUILDERS ASSOCIATION, INC., et al,

Petitioners,

v.

THE DIRECTOR OF THE MICHIGAN DEPARTMENT OF TRANSPORTATION, in his official capacity, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# BRIEF FOR RESPONDENTS IN OPPOSITION

FRANK J. KELLEY
ATTORNEY GENERAL

THOMAS L. CASEY
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

PATRICK F. ISOM
DAVID L. BALAS
Assistant Attorneys General
Attorneys for Respondents

## QUESTIONS PRESENTED

I

WHETHER RESPONDENT'S FISCAL YEAR 1991 DBE GOAL OF 15%, WITH THE LIMITED USE OF SET-ASIDE CONTRACTS IN THE AMOUNT OF 1.32%, WAS ENTIRELY CONSISTENT WITH AND INDEED MANDATED BY THE SURFACE TRANSPORTATION AND UNIFORM RELOCATION ASSISTANCE ACT OF 1987 AND ITS IMPLEMENTING REGULATIONS.

II

WHETHER THE LACK OF STANDING ISSUE IS IRRELEVANT AND MOOT WHEN BOTH COURTS BELOW ADDRESSED THE MERITS AND THE SIXTH CIRCUIT DID NOT AFFIRM THE RULING THAT PETITIONER LACKED STANDING.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... 1

INDEX OF AUTHORITIES ..... iv

STATEMENT OF THE CASE ..... 1

1. The federal scheme under STURAA.. 2

2. Michigan's compliance with the federal scheme ..... 12

3. The trial and stipulation of the parties ..... 16

4. The District Court Decision ..... 20

5. The Sixth Circuit Decision ..... 24

SUMMARY OF REASONS FOR DENYING THE WRIT ..... 25

REASONS FOR DENYING THE WRIT ..... 30

THE SIXTH CIRCUIT'S DECISION UPHOLDING RESPONDENT'S FISCAL YEAR 1991 DBE GOAL OF 15% WITH THE LIMITED USE OF SET-ASIDE CONTRACTS IN THE AMOUNT OF 1.32% WAS ENTIRELY CONSISTENT WITH AND INDEED MANDATED BY STURAA AND ITS IMPLEMENTING REGULATIONS AND THE APPLICABLE DECISIONS OF THIS COURT ..... 30

1. THE CONSTITUTIONALITY OF STURAA AND ITS IMPLEMENTING REGULATIONS HAVING BEEN CONCEDED BELOW, THE FACTS OF THIS CASE DO NOT PRESENT THE CONSTITUTIONAL ISSUE ASSERTED BY PETITIONER ..... 30

Page

2. HAVING WAIVED OBJECTION TO MDOT'S METHODOLOGY USED IN ARRIVING AT ITS 15% OVERALL DBE GOAL, PETITIONER DOES NOT PRESENT AN IMPORTANT QUESTION ABOUT MDOT'S COMPLIANCE WITH STURAA AND ITS REGULATIONS WORTHY OF THIS COURT'S ATTENTION ..... 32

3. PETITIONER'S COLLATERAL CHALLENGE TO FHWA'S APPROVAL OF DBE GOALS PRESENTS A HYPOTHETICAL QUESTION NOT WARRANTING REVIEW BY THIS COURT ..... 35

4. THE LOWER COURTS' DECISIONS UPHOLDING MDOT'S USE OF 1.32% SET-ASIDES AS AUTHORIZED BY THE FEDERAL SCHEME AND CONSISTENT WITH STATE LAW WERE CORRECTLY DECIDED ..... 38

5. THE LOWER COURTS CORRECTLY HELD THAT THE CONSTITUTION PERMITS A STATE TO IMPLEMENT A FEDERAL AFFIRMATIVE ACTION PROGRAM ..... 41

6. THE STANDING ISSUE IS NOT RELEVANT AND IS MOOT ..... 47

CONCLUSION AND RELIEF SOUGHT ..... 50

TABLE OF AUTHORITIES

Pages

Cases

City of Richmond v J.A. Croson Co,
488 US 469 (1989) .....passim

Fullilove v Klutznick,
448 US 448 (1980) .....passim

Harrison & Burrows v Cuomo,
981 F2d 50 (2nd Cir, 1992) ..... 46

Metro Broadcasting v Federal
Communications Commission,
497 US 547 (1990) ..... 43

Michigan Road Builders Association,
Inc v Milliken, 834 F2d 583
(6th Cir, 1987), aff'd,
489 US 1061 (1989) .....22,42

Milwaukee County Pavers
Association v Fiedler,
922 F2d 419 (7th Cir, 1991) ..... 43

Tennessee Asphalt Company v Farris,
942 F2d 969 (6th Cir, 1991) ..... 45

Statutes

Intermodal Surface Transportation
Act of 1991, Pub. L. 102-240,
105 Stat 1918-1919 ..... 2

Small Business Act, 15 USC § 632 .... 4

Surface Transportation Assistance
Act, Pub L No 97-424; 96 Stat
2097, 2100 (1983) ..... 45

Page

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat 132 (1987) ..... 1

Other

Sup. Ct. R. 10.1 ..... 47

Supreme Court Practice, 6th Edition, § 4.4, pp 200-201 (1986) ..... 48

Title 23 of the U.S. Code .....passim

49 CFR § 23.1 et seq .....1,45

49 CFR § 23.1(b) ..... 3

49 CFR § 23.2 ..... 3

49 CFR § 23.41(a)(3)(i) ..... 8

49 CFR § 23.45 ..... 8

49 CFR § 23.45(g) .....6,33

49 CFR § 23.45(g)(1) ..... 6

49 CFR § 23.45(g)(5) ..... 7

49 CFR § 23.45(h)(2) ..... 15

49 CFR § 23.45(k) .....8,9,38,39

49 CFR § 23.53 ..... 4

49 CFR § 23.64(a)(d) and (e) .....9,34

49 CFR § 23.65 ..... 34

49 CFR § 23.66 .....12,36

49 CFR § 23.66(a) and (b) ..... 12

49 CFR § 23, Appendix A ..... 15

## STATEMENT OF THE CASE

As a condition of receiving federal funds for highway construction projects, recipients such as the Michigan Department of Transportation ("MDOT") must comply with the provisions of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17, 101 Stat 132 (1987) ("STURAA") and its implementing federal regulations, 49 CFR § 23.1 et seq, including those relating to the use of Disadvantaged Business Enterprises ("DBEs"). (Pet. App. 36a-56a) Under the federal regulations, recipients are required to annually set goals for participation of DBEs in federally funded highway projects and submit the goals to the designated agency of the United States Department of Transportation ("USDOT") for review and approval.

Petitioner Michigan Road Builders Association, Inc. ("MRBA") initially challenged MDOT's DBE goal approved for use in Fiscal Year (FY) 1990, but during the course of this litigation, the 1990 DBE goal was superseded by MDOT's DBE goal approved for use in FY 1991. Trial was conducted based upon the 1991 DBE goal.[1]

1. The federal scheme under STURAA.

At issue in this case are federal highway dollars distributed to Michigan under STURAA.

---

[1]Since trial of this case, Congress has re-authorized STURAA under the Intermodal Surface Transportation Act of 1991, Pub. L. 102-240, 105 Stat 1918-1919. The pertinent language is identical to that which appeared in STURAA. It should also be noted that MDOT continues to recommend for approval a new DBE goal for each fiscal year; MDOT has obtained approval of a DBE goal for FY 1993 of 13.52%. This case, however, involves STURAA and MDOT's FY 1991 federally approved DBE goal.

STURAA states, in part, as follows:

> Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts authorized [for highway projects] . . . shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals [DBEs]. Section 106(c) of STURAA. [Emphasis added.]

Federal regulations to implement the 10% minimum national DBE goal are set forth at 49 CFR, Part 23.[2]

---

[2] 49 CFR § 23.1(b) states in part as follows:

> This part implements . . . Title 23 of the U.S. Code (relating to highways and highway safety).

STURAA is part of Title 23. 49 CFR § 23.2 states, in part:

> This part applies to any DOT program through which funds are made available to members of the public for accomplishing DOT's purposes.

In order for a contracting business to be certified as a DBE, the business must meet certain criteria as set forth in 49 CFR § 23.53. A contracting firm is disadvantaged, according to the federal regulations, if it is small[3] and is owned and controlled by individuals who are socially and economically disadvantaged.

Under the federal regulations, there is a rebuttable presumption that women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans are socially and economically disadvantaged.

---

[3]What constitutes "small" is defined in STURAA and its implementing regulations by reference to section 3 of the Small Business Act, 15 USC § 632 and the relevant regulations promulgated thereunder.

Other individuals may be found to be socially and economically disadvantaged on a case-by-case basis. If an individual applies for DBE certification, the state must make a determination of social and economic disadvantage, whatever the individual's race, ethnic origin and gender may be. This process allows for the certification of socially and economically disadvantaged white males as well as the denial of certification for members of presumptive groups who are found not to be socially and economically disadvantaged. A white male was, in fact, found to be socially and economically disadvantaged as a result of his handicap and certified by MDOT as a DBE. MRBA members are free to take advantage of this opportunity.

49 CFR § 23.45(g) addresses two kinds of DBE goals: (a) overall goals for the entire DBE program, and (b) contract goals on each specific contract with subcontracting possibilities. Only the former goal is challenged in the instant case.

With regard to overall DBE goals, 49 CFR § 23.45(g)(1)[4] states:

> (1) Once the recipient has reviewed proposed contracting to identify those contracting activities which have the greatest potential for MBE [DBE] participation, the recipient shall set goals that are practical

---

[4]With enactment of STURAA, the program was expanded from a minority business enterprise (MBE) program to a disadvantaged business enterprise (DBE) program and the DBE designation superceded the MBE designation. Petitioner has stipulated that the regulations "incorporated the definition of social and economic disadvantage" and implement the expanded DBE program under STURAA. (Sixth Circuit Joint Appendix, Vol II, pp 335-336, ¶¶ 7, 8, 10, 11, 12 and 13.)

> and related to the potential availability of MBEs [DBEs] in desired areas of expertise.
> [Emphasis added.]

In setting overall DBE goals which are "practical and related to the potential availability of [DBEs] in desired areas of expertise," the recipient must apply certain mandated federal criteria:

> (5) The applicant shall consider the following factors in setting overall goals:
>
> > (i) Overall goals shall be based on projection of the number and types of contracts to be awarded by the applicant and a projection of the number and types of MBEs [DBEs] likely to be available to compete for contracts from the recipient over the period during which the goals will be in effect.
> >
> > (ii) Overall goals shall also be based on past results of the applicant's/recipient's efforts to contract with MBEs [DBEs] and the reasons for the high or low level of those results.
> 49 CFR § 23.45(g)(5)

The STURAA goal setting and submission process is mandatory under 49 CFR, § 23.41(a)(3)(i) which provides:

> (3) All applicants and recipients in the following categories who will let DOT-assisted contracts shall implement an MBE [DBE] program containing all the elements set forth in § 23.45. The program shall be submitted for approval to the DOT element concerned with application for assistance or project approval.
>
> (i) Applicants for Federal-aid highway program funds; [Emphasis added.]

As the underlined language indicates, recipients shall implement the program and do so in accordance with 49 CFR, § 23.45. 49 CFR § 23.45(k), adopted pursuant to STURAA, requires states under certain conditions to set aside contracts to be bid upon and awarded exclusively to DBEs ("set-aside contracts") as follows:

> Where not prohibited by state or local law and determined by the recipient to be necessary to meet MBE [DBE] goals, procedures to implement MBE [DBE] set asides shall be established.
> 49 CFR § 23.45(k).

With regard to submission of DBE percentage goals to FHWA above or below the 10% level, 49 CFR § 23.64(a)(d) and (e) state:

> (a) Each recipient of funds to which this subpart applies that is required to have an MBE [DBE] program under § 23.41 of this part shall establish an overall goal for the use of disadvantaged businesses.
>
> ***
>
> (d) Recipients submitting a goal of ten percent or more shall submit the goal under the procedures set forth in § 23.45(g) of this part.
>
> (e) If an FHWA or UMTA or FAA recipient requests approval of an overall goal of less than ten percent, the recipient shall take the following steps in addition to those set forth in § 23.45(g) of this part: [Emphasis added.]
>
> [Additional procedures are then set forth in the regulation.

> Since MDOT's goal is 15%, those procedures are not relevant.]

It is apparent that while the national goal is "not less than 10 percent," the goal for each recipient throughout the United States may be greater or less than 10 percent. The interpretation and practice of FHWA in this regard were specifically addressed by Respondent several years ago when the MRBA questioned MDOT's interpretation of the federal regulations. A clarification was sought from the FHWA. In response, USDOT's Deputy Assistant General Counsel Robert Ashby conveyed FHWA's position:

> In other words, the recipient must determine, based on the factors set forth in section 23.45(g) (i.e., number and availability of DBEs, the contracting opportunities for DBEs during the period covered by the goal, the historical participation of DBEs in the recipient's programs), what its overall goal should be. Doing so is a Federal regulatory

> requirement for recipients in the programs to which the DBE regulations apply (49 CFR 23.64(d)). If the goal submitted by the recipient is not sufficient under the standards of section 23.45(g), then it is subject to disapproval (49 CFR § 23.66), and the recipient could, ultimately, be found in noncompliance (49 CFR § 23.68). . . . Under the statute and regulations, the ten percent requirement is a minimum for nationwide DBE participation that this Department is expected to attain, not a ceiling on goals that the Department may expect a recipient to set.
>
> The statute and its legislative history do not vitiate the requirement of 49 CFR § 23.45(g) that recipients set appropriate goals based on their circumstances. If, based on the relevant factors, a recipient's goal should be higher than ten percent, then the recipient is obligated to set its goal at that higher level. The judgment about whether a state's proposed overall goal is acceptable is made by the concerned DOT operating administration (e.g., the Federal Highway Administration); this letter should not be construed as making any prejudgment about the specific goal that it is appropriate for the State of Michigan to establish.

Plaintiffs offered no evidence whatsoever to contradict that evidence of

FHWA's actual practice and its interpretation of the statute and regulations.

As referenced in Counsel Ashby's correspondence, 49 CFR § 23.66 provides for review and approval of all proposed DBE goals:

> (a) The Administrator reviews and approves any overall goal of ten percent or more submitted by a recipient as provided in § 23.45(g) of this part.
>
> (b) The Administrator of the concerned Departmental element approves a requested goal of less than ten percent if he or she determines, on the basis of the recipient's justification and any other information available to the Administrator, that ... . 49 CFR § 23.66(a) and (b). [Emphasis added.]

2. Michigan's compliance with the federal scheme.

In establishing a FY 1991 DBE goal, MDOT prepared a report entitled

"Development of the 1991 Fiscal Year Overall Goal for DBE participation." This report set forth the federally mandated criteria for developing an annual DBE goal and the methodology MDOT used to calculate its recommendation of a 15% DBE goal for FY 1991, including a projected minimal use of set-aside contracts, in the amount of 1.32%, necessary to meet the 15% DBE goal.

In response to MDOT's recommendation, the MRBA advised MDOT that it did not object to the methodology used by MDOT to reach the 15% DBE goal, but only objected to the level of the 15% DBE goal and the use of any set-aside contracts to achieve that goal unless MDOT first made independent findings that there had been past discrimination in Michigan.

Petitioner asserts in its Statement of the Case that 95% of the MRBA's members are excluded from bidding because of the member's race, ethnic origin and gender and implies that this exclusion extends to 15% of the total dollar amount of all federal highway funds awarded in Michigan for the year in question. (Pet. 4) That statement is misleading.

In fact, only 1.32% of project funds are set aside for bidding solely by DBEs. The MRBA's members do bid on the remaining 98.68% of projects. MDOT meets the remaining 13.68% of its goal by imposing various levels of DBE subcontracting requirements on those contracts which meet specified criteria.

The Michigan State Transportation Commission ("Commission"), which serves

as the policy-making head of MDOT, adopted the FY 1991 DBE goal of 15% and the minimal use of set-aside contracts in the amount of 1.32% at its meeting of August 22, 1990.

At the same August 22, 1990 meeting, the Commission formalized MDOT's past practice of affording contractors bidding on a federally funded project a means by which to seek a modification or waiver of DBE subcontracting requirements for specific contracts. This waiver procedure was implemented in accordance with 49 CFR § 23.45(h)(2) and the basic guidance provided at 49 CFR 23, Appendix A. Written guidance on this issue has been provided to contractors, and a revised Contract Special Provision and standardized form for Requests for Waiver have been developed.

The FHWA approved the recommended FY 1991 DBE goal on October 1, 1990, and the waiver form on October 2, 1990.

3. The trial and stipulation of the parties.

A bench trial was held on November 7 and 8, 1990. The facts and other matters expressly accepted by the parties and set forth in the Order On Pretrial Conference entered by the District Court on October 29, 1990 included, among other things, the following:

> II. Uncontroverted Facts: The parties have agreed that the following may be acceptable as established facts for purposes of this case only:
>
> ***
>
> 11. The state must comply with federal rules regarding contracting generally, and with federal rules respecting the disadvantaged business program in particular, as a condition of receiving federal funding of

construction projects. 23 U.S.C. Secs. 101 et seq. and 49 C.F.R. Sec. 23.68.

12. The federal regulations require a recipient of federal funds under STURAA, such as MDOT, to establish an annual goal for the use of Disadvantaged Business Enterprises (DBEs) and submit the goal to the United State[s] Department of Transportation (DOT) for approval. 49 CFR § 23.64. The regulations permit deviation from the statutory 10% target figure, either upward, 49 CFR § 23.64(d), or downward, 49 CFR §§ 23.64(e), 23.65. In setting its annual goal, MDOT is required to consider criteria such as the number and types of contracts to be awarded, the number of DBEs available to compete for these contracts, and the results of past efforts to contract with DBEs. 49 CFR §§ 23.64(d), 23.45(g)(5).

***

22. After having the opportunity to review the 'Development of the 1991 Fiscal Year Overall Goal for DBE Participation', the Plaintiff, Michigan Road Builders Association, Inc. on August 16, 1990, stated, among other things, that it had 'no objection to the procedure being used to develop the 1991 DBE Goal which considers prior

achievements, DBE contractor availability and the projected construction program.'

***

24. On August 22, 1990, the Commission adopted a 15% DBE Goal for the fiscal year beginning October 1, 1990.

25. On August 23, 1990, MDOT sent its 15% DBE goal to FHWA for review and approval.

***

29. On October 1, 1990, the FHWA approved MDOT's DBE Goal of 15% for Fiscal Year 1991, effective October 1, 1990.

***

33. The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. 100-17, and the regulations adopted pursuant to STURAA found at 49 CFR 23.1 et seq. are constitutional for purposes of this action only. [Emphasis added.]

As seen above, Petitioner stipulated at trial and reiterated in both its trial and post-trial briefs that, for

purposes of this lawsuit, STURAA and its implementing federal regulations were constitutional. Petitioner made a deliberate decision to forego challenging the constitutionality of STURAA and its implementing regulations. In reliance on that stipulation, neither the USDOT nor the FHWA were made parties nor given the opportunity to otherwise participate in this case.

Petitioner, in its Statement of the Case (Pet. 4-5), suggests that Commission policy, rather than federal requirements, served as the basis for the Commission's adoption of a recommendation to use 1.32% set-aside contracts to achieve its 15% overall DBE goal. However, as MDOT testified at trial, while there were secondary reasons sup-

porting the use of set-aside contracts, set-aside contracts would not have been used if not necessary to achieve the overall DBE goal. Petitioner's Statement of the Case omits any reference to this unrefuted testimony by MDOT.

4. The District Court Decision.

On April 11, 1991, the District Court issued its Opinion and Judgment. MDOT and the Commission were dismissed as Defendants under the Eleventh Amendment. (Pet. App. 10a-11a) Former Governor James J. Blanchard was dismissed for Petitioner's failure to state a claim. (Pet. App. 11a) Finally all of Petitioner's claims were denied. (Pet. App. 22a)

The District Court found that the Petitioner had failed to establish

standing since Petitioner's testimony at trial did not meet Petitioner's burden of establishing standing by showing real, concrete injury. (Pet. App. 17a) There was no testimony that any individual Petitioner had either sought to be certified as a DBE, or had applied for and was available to complete any of the advertised projects. The District Court found the alleged injury to the sole Petitioner who testified only conjectural and hypothetical. (Pet. App. 12a-14a)

With respect to the MRBA itself, the District Court found MRBA had no standing since: (1) its individual members had not demonstrated standing on their own right; and (2) the Third Amended Complaint was not germane to MRBA's own

Constitution and By-Laws which provided that the MRBA "conduct only those activities which are for the common good and benefit alike for all members." (Pet. App. 14a, 16a) That is, some of MRBA's members were found to be DBEs as to whom the lawsuit would be detrimental rather than beneficial. (Pet. App. 16a)

Notwithstanding that decision, the District Court went on to rule on the merits of Petitioner's claims.

The District Court noted the irrelevance of Michigan Road Builders Association, Inc v Milliken, 834 F2d 583 (6th Cir, 1987), aff'd, 489 US 1061 (1989), which had struck down a state law based affirmative action program. (Pet. App. 17a) That program controlled the expenditure of state, not federal,

funds and there has been no claim that Respondent has, in any way, resurrected the program.

The District Court determined that MDOT had conscientiously followed the applicable federal statute and regulations. (Pet. App. 19a, 22a) The District Court recognized that neither STURAA and the federal regulations nor Fullilove v Klutznick, 448 US 448 (1980), and City of Richmond v J.A. Croson Co, 488 US 469 (1989), required MDOT as a recipient of federal funds, to conduct any inquiry to determine the existence of prior discrimination in Michigan. (Pet. App. 19a) The action of Respondent in establishing a FY 1991 DBE goal of 15% of which only 1.32% was reserved for set-aside contracts was

found to be a proper and constitutional implementation of federal law, consistent with the Fullilove and Croson decisions. (Pet. App. 17a-22a)

5. The Sixth Circuit Decision.

The Petitioner filed a claim of appeal on May 9, 1991 challenging the District Court's opinion on the issues of standing and the constitutionality of MDOT's actions. The Sixth Circuit Court of Appeals questioned the Distict Court's conclusions on lack of standing, then adopted, as its own, the District Court's reasoning on the merits of Petitioner's claims. (Pet. App. 1a) The Sixth Circuit specifically noted that, under the facts of this case, resolution of the appeal is governed by the Supreme Court's decision in

Fullilove rather than in Croson. (Pet. App. 1a)

SUMMARY OF REASONS FOR DENYING THE WRIT

Since Petitioner expressly stipulated to the constitutionality of STURAA and its implementing regulations, this case does not raise constitutional issues. Moreover, the case presents no close questions of interpretation; Petitioner has identified no basis for its position in STURAA or the regulations.

Respondent relies upon FHWA approval of its program and the plain and unambiguous language of STURAA and its implementing regulations to support both its 15% DBE goal and the 1.32% set-aside technique to aid in achieving that goal.

Respondent asserts that STURAA and its implementing regulations provide the

sole authority for its DBE program. By its enactment of STURAA, Congress determined that there had been past discrimination sufficient to justify remedial action and fashioned the remedy to address that past discrimination. While the point is not put in issue by this case, both Croson and Fullilove recognize the congressional power under Section 5 of the Fourteenth Amendment is to remedy such society-wide discrimination.

Recipients, such as Respondent, were not required to make individual findings of past discrimination nor were they required to individually establish the criteria to narrowly tailor the remedy. Indeed, recipients could not voluntarily undertake such an effort. Respondent

was not authorized to make separate findings with respect to past discrimination in Michigan and, based upon such separate findings, to either refuse to participate or modify the terms of its participation in the federally mandated program. Congress, not the recipients, fashioned the criteria by the program. Respondent's DBE program was intended to carry out the federal mandate in a manner which conformed to the remedial criteria fashioned in federal regulations. Respondent makes no claim to any independent basis in Michigan law for its DBE program.

Respondent specifically sought guidance from FHWA regarding the MRBA claim that MDOT's DBE goal was not to exceed 10 percent. FHWA advised Respondent to

apply the criteria set forth in the federal regulations and that, if application of the regulations to the factual circumstances in Michigan yielded a DBE goal in excess of 10%, Respondent was obligated to adopt such higher percentage goal. Both the trial and appellate courts below correctly found that Respondent did nothing more than conscientiously follow federal law.

Petitioner also seeks review of a standing issue. It is true that United States District Court Judge Douglas Hillman opined that Petitioner lacked standing; however, Judge Hillman conducted a trial on the merits and then ruled on the substantive merits of the Petitioner's claim. The United States Sixth Circuit Court of Appeals subse-

quently expressed disagreement with Judge Hillman's remarks on the standing issue, but went on to fully adopt his reasoning on the merits of the case. Since both courts decided the merits, Petitioner was obviously not denied consideration of the merits of its claims for lack of standing. The standing issue is moot. Resolution of the standing issue is, therefore, irrelevant to the ultimate outcome of the case.

This case has received more than adequate judicial scrutiny. No conflict of decision is presented by this case and no important question of federal law is raised. The petition should be denied.

## REASONS FOR DENYING THE WRIT

### THE SIXTH CIRCUIT'S DECISION UPHOLDING RESPONDENT'S FISCAL YEAR 1991 DBE GOAL OF 15% WITH THE LIMITED USE OF SET-ASIDE CONTRACTS IN THE AMOUNT OF 1.32% WAS ENTIRELY CONSISTENT WITH AND INDEED MANDATED BY STURAA AND ITS IMPLEMENTING REGULATIONS AND THE APPLICABLE DECISIONS OF THIS COURT.

1. THE CONSTITUTIONALITY OF STURAA AND ITS IMPLEMENTING REGULATIONS HAVING BEEN CONCEDED BELOW, THE FACTS OF THIS CASE DO NOT PRESENT THE CONSTITUTIONAL ISSUE ASSERTED BY PETITIONER.

Petitioner misstates the nature of the case when Petitioner asserts that the issue before this Court is whether Respondents' and the lower courts' construction of STURAA and the Federal Regulations can be considered a narrowly tailored means employed by Congress to achieve its objective, or whether STURAA and the Federal Regulations should be construed to mandate a preference goal

of just 10%. (Pet. 20) After conceding the constitutionality of STURAA and its implementing regulations below, Petitioner remains free to dispute the correctness of the court's construction of STURAA and the regulations, but may not dispute their constitutionality as so construed. However, virtually all of Petitioner's arguments represent an attempt to challenge their constitutionality under the guise of arguing the correct construction of STURAA and its regulations. (Pet. 21-22)

Petitioner knew when it filed this lawsuit that both Respondent and the FHWA interpreted the plain language of STURAA and the federal regulations to provide for DBE goals above 10 percent. Petitioner knew that FHWA had advised

Respondent that it was obligated to adopt a goal over 10% where application of the regulations yielded a goal in excess of 10 percent. Petitioner may not disclaim a constitutional challenge, exclude FHWA from participation in the suit, and then collaterally attack the entire federal DBE program. Having waived a constitutional challenge below, the petition attempting to resurrect it before this Court should be denied.

2. HAVING WAIVED OBJECTION TO MDOT'S METHODOLOGY USED IN ARRIVING AT ITS 15% OVERALL DBE GOAL, PETITIONER DOES NOT PRESENT AN IMPORTANT QUESTION ABOUT MDOT'S COMPLIANCE WITH STURAA AND ITS REGULATIONS WORTHY OF THIS COURT'S ATTENTION.

Petitioner attempts to circumvent its concession regarding STURAA's constitutionality when it argues that the 15%

overall DBE goal submitted by MDOT and approved by the FHWA fails to comply with STURAA and its regulations because these provisions "should be construed to mandate a preference goal of just 10%." (Pet. 20) This argument was thoroughly considered by the courts below and correctly rejected as lacking merit.

The uncontroverted testimony at trial revealed at least 12 other jurisdictions have approved DBE goals in excess of 10%. If the applicable regulation, 49 CFR § 23.45(g) (Pet. App. 47a-49a) did not require that states adopt a DBE goal in excess of 10% when calculated according to the three criteria established by the rules, there would be no reason for these twelve states to have a goal over 10%, nor for FHWA to have approved those goals.

MDOT's application of the regulations was approved by FHWA consistent with its actual past practice and interpretation of the statute and regulations it is charged with administering. STURAA's plain language requires an expenditure of "not less than 10 percent" of authorized funds with DBEs. STURAA, § 106(c). Petitioner stipulated that the regulations permit deviation from the statutory 10% figure either upward or downward pursuant to 49 CFR §§ 23.64(d) and (3) and 23.65. Petitioner has identified no aspect of Respondent's program which is contrary to those regulations.

The regulations require recipients to set goals based upon their local circumstances. Petitioner has not iden-

tified, and cannot identify, any language in STURAA and its implementing regulations to support Petitioner's construction that authority is only thereby given for DBE goals up to 10 percent. The lower courts correctly decided this case and Petitioner's efforts to escape its own admission below should fail.

### 3. PETITIONER'S COLLATERAL CHALLENGE TO FHWA'S APPROVAL OF DBE GOALS PRESENTS A HYPOTHETICAL QUESTION NOT WARRANTING REVIEW BY THIS COURT.

Petitioner contends that the decisions below interpret STURAA and its regulations to authorize a recipient to "adopt an unlimited goal" and to award all or up to 100% of its federal funds for highway projects to DBEs. (Pet. 6, 18, 19, 20)

Petitioner claims that any goal in excess of 10% is automatically approved by FHWA and is purely voluntary. No one, aside from Petitioner, has so much as suggested that a 100% DBE goal could be supported by any recipient or approved by FHWA. Nor have the lower courts rendered any decision such as described by Petitioner. The argument, overstating the rulings below and hypothesizing a state of facts unrelated to this case, lacks merit.

49 CFR § 23.66 provides for review and approval of all proposed DBE goals. (Pet. App. 56a) Given the regulatory criteria, it is inconceivable that every recipient in the United States could set 100% DBE goals and have them all approved by FHWA with the result that

"DBE's are entitled to all Federal-aid highway construction contracts." To so frame the dispute in this case is pure fantasy and ignores STURAA's purpose to facilitate the entry of DBEs into the contracting mainstream.

This case pertains to the goal set by a single recipient of federal highway funds. Respondent has never proposed a goal in excess of 15%.[5] Whether any higher goal might in a future case on different facts be submitted and be approved by FHWA is utter speculation. The evidence in this case pertains to what Respondent was required to do to arrive at a DBE goal in compliance with

---

[5]Indeed, as goals are set annually, Respondent's current DBE goal has been reduced to 13.52%.

federal regulations. Petitioner chose not to name the FHWA as a party to this case and not to challenge its regulations and administration of the DBE program. No evidence was taken regarding the extent to which FHWA might approve recipient goals aggregating in excess of 10 percent. Petitioner's speculation as to how FHWA might administer the national DBE program and related collateral attack on those hypothetical actions does not present a question worthy of this Court's attention.

4. THE LOWER COURTS' DECISIONS UPHOLDING MDOT'S USE OF 1.32% SET-ASIDES AS AUTHORIZED BY THE FEDERAL SCHEME AND CONSISTENT WITH STATE LAW WERE CORRECTLY DECIDED.

49 CFR § 23.45(k), adopted pursuant to STURAA, authorizes the use of set-

aside contracts "[w]here not prohibited by state or local law and determined by the recipient to be necessary to meet MBE [DBE] goals." (Pet. App. 50a)

The language of 49 CFR § 23.45(k) discloses a federal intent to allow states to enact laws to prohibit use of set-asides, even if determined to be necessary to meet DBE goals. However, neither below nor in this Court has Petitioner identified any Michigan statute which would prohibit the use of set-asides. The Michigan legislature has not elected to opt out of using set-asides in this federal program.

The fact that the use of set-aside contracts will have other secondary beneficial effects, as noted in the Commission's policy and testimony of

Respondent, does not make their use unconstitutional. STURAA was adopted to allow DBEs the opportunity to enter into the mainstream of contracting and eventually gain sufficient experience to compete effectively with the established contracting community. The use of set-asides furthers that objective by allowing DBEs the opportunity to be prime contractors so that they can develop the skills, business structures and relationships, etc. necessary to act as a prime contractor and to engage in such competition.

Nevertheless, Respondent specifically testified at trial that even with their secondary beneficial effects, set-asides would not be used if not necessary to achieve MDOT'S overall DBE goal.

The testimony was uncontroverted, however, that use of set-asides was indeed necessary to meet MDOT's DBE goals.

5. THE LOWER COURTS CORRECTLY HELD THAT THE CONSTITUTION PERMITS A STATE TO IMPLEMENT A FEDERAL AFFIRMATIVE ACTION PROGRAM.

In Fullilove this Court held that Congress had the power to impose an affirmative action program such as at issue here as part of its power to enforce the equal protection guarantee of the Fourteenth Amendment. In his opinion, Chief Justice Burger stated that:

> Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional anti-discrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct. Id., pp 483-84.

Petitioner argues that Croson is applicable to the actions of the Respondent.[6] That case held that a DBE program established by a city was unconstitutional because the city had not made any findings that it had caused prior discrimination. Croson did not involve implementation of a federal program. It did not overrule Fullilove but instead specifically recognized its continuing

---

[6]Indeed, Petitioner confuses the issues, failing to acknowledge the difference between the legal analysis this Court has held applicable to cases involving federal dollars expended by a state under a federal program adopted by Congress (such as here and in Fullilove) and those cases involving non-federal dollars expended under a program adopted by a political subdivision of a state (such as in Croson). See, e.g., Petitioner's citation to Milliken, supra, in which a state law program was struck down and no authority of Congress to enforce the Fourteenth Amendment was involved. (Pet. 4, n. 1)

validity. The lower courts correctly ruled that Croson does not apply to the instant matter because MDOT is implementing a federal program.

In Metro Broadcasting v Federal Communications Commission, 497 US 547 (1990), which was decided subsequent to Croson, this Court again held that Congress had the authority to specifically approve and mandate minority programs similar to those implemented by MDOT.

The rulings of the lower courts upholding Respondent's DBE program are supported by other appellate decisions as well. For example, in Milwaukee County Pavers Association v Fiedler, 922 F2d 419 (7th Cir, 1991), the plaintiffs challenged the DBE program followed by

Wisconsin which was very similar to that followed by MDOT herein. The Court upheld the constitutionality of Wisconsin's program and distinguished Croson:

> It is true that the statute [STURAA] does not require the states to accept funds under it and, by doing so, to become subject to the set-aside provision and the implementing regulations. But it authorizes them to do so, and action pursuant to a valid authorization is valid. The joint lesson of Fullilove and Croson is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. And one way it can do that is by authorizing states to do things that they could not do without federal authorization. That was Fullilove; it is this case as well. 922 F2d at 423-424.

The Court went on to hold:

> They [Plaintiffs] are challenging the state's role in the program. Insofar as the state is merely doing what the statute [STURAA] and regulations envisage and permit, the

> attack on the state is an impermissible collateral attack on the statute and regulations.
> 922 F2d at 424.

The Sixth Circuit recently discussed the difference between Croson and Pullilove in Tennessee Asphalt Company v Farris, 942 F2d 969 (6th Cir, 1991). In that case, the Tennessee Road Builders Association and some of its members filed an action to challenge the constitutionality of Tennessee's DBE program. Like the instant matter, the plaintiffs in that case conceded that the Surface Transportation Assistance Act, Pub. L. No 97-424; 96 Stat 2097, 2100 (1983), the forerunner of STURAA, and the regulations found at 49 CFR § 23.1 et seq were constitutional, but alleged that they were improperly applied by Tennessee. 942 F2d at 972. The Court

held otherwise concluding that the case was ". . . controlled by Fullilove and not by Croson and Wygant." 942 F2d at 975. The Court noted that a state's compliance with the mandates of a federal scheme is nothing more than compliance with federal law. 942 F2d at 975.

The Second Circuit in Harrison & Burrowes v Cuomo, 981 F2d 50 (2nd Cir, 1992), reached a similar conclusion in finding that the State of New York properly followed STURAA and the federal regulations in adopting a DBE goal of 17%.

MDOT's DBE goal is a conscientious implementation of a lawfully enacted federal program and was correctly upheld by the courts below.

## 6. THE STANDING ISSUE IS NOT RELEVANT AND IS MOOT.

As stated in Sup. Ct. R. 10.1, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion". Generally, certiorari will be granted only in the most compelling of circumstances, such as the need to secure uniformity of federal law or to address an issue of overriding public importance. Accord Sup. Ct. R. 10.1 (a)-(c). No such compelling circumstance exists with respect to the standing issue in this case.

It cannot be disputed that the Sixth Circuit did not affirm the District Court's decision on the standing issue. The Sixth Circuit questioned the conclusions of the District Court concerning

lack of standing (Pet. App. 1a), but obviously felt no need to elaborate since the merits of Petitioner's claims were addressed. The Sixth Circuit decision, therefore, provides no real or intolerable conflict among the circuits or even an adjudication of the standing issue warranting review by the Court. Addressing the District Court's analysis of the standing issue would be irrelevant to the ultimate outcome of the case, with both courts below having reached a decision on the merits. Resolution of any perceived conflict would not change that decision on the merits.

In Stern, Gressman & Shapiro, Supreme Court Practice, 6th Edition § 4.4, pp 200-201 (1986), the authors cite the policy of letting tolerable

conflicts go unaddressed, especially if the issue is no longer a live one or the resolution of the conflict is irrelevant to the ultimate outcome of the case before the Court. The standing issue in this case does not warrant review by this Court.

## CONCLUSION AND RELIEF SOUGHT

For all of the foregoing reasons, Respondent respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Patrick F. Isom
David L. Balas
Assistant Attorneys General
Attorneys for Respondents

February 19, 1993

No. 92-1379

# In The
# Supreme Court of the United States
**October Term, 1992**

**Michigan Road Builders Association, Inc., et. al.,**
*Petitioners,*

v.

**The Director of the Michigan Department of Transportation, in his official capacity, et. al.,**
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## Petitioners' Reply Brief

John Bernard Weaver*
Daniel R.W. Rustmann
Susan Jezewski Evans
**Butzel Long**
150 West Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7000
*Attorneys for Petitioners*

March 29, 1993

*Counsel of Record

## Table of Contents

1. Neither STURAA Nor The Federal Regulations Were Intended To Require States To Set And Meet DBE Preference Goals Based Solely On The Availability Of DBE Contractors. . . . . 2

2. Neither STURAA Nor The Federal Regulations Required The Use Of Set-Asides To Meet Unlimited DBE Goals, And Respondents' Use Of Set-Asides To Meet Their DBE Goal Above 10% With No Compelling State Interest Is Constitutionally Invalid. . . . . 8

Conclusion . . . . . 9

Appendix . . . . . 1a

Final Rule, Participation By Minority Business Enterprises In Department Of Transportation Programs, 45 FR 21178 (March 31, 1980) (Pertinent Pages Only) . . . . . 1a

Notice of Proposed Rule Making, Participation By Minority Business Enterprises in Department of Transportation Programs, 48 FR 8416 (February 28, 1983) (Pertinent Pages Only) . . . . . 4a

Final Rule, Participation By Minority Business Enterprises in Department of Transportation Programs, 48 FR 33432 (July 21, 1983) (Pertinent Pages Only) . . . . . 15a

[The list of parties to this Petition, together with the Rule 29 Statement regarding parents and subsidiaries, is contained in the original Petition at ii - iii.]

## Index of Authorities

*Fullilove v. Klutznick,*
448 U.S. 448 (1980) . . . . . 2

*O'Donnel v. District of Columbia,*
No. 89-1867, 1992 U.S. Dist.
LEXIS 19723 (D.C.D.C.,
December 22, 1992) . . . . . 6

49 CFR Part 23 . . . . . 3-9

45 Fed. Reg. 21178
(March 31, 1980) . . . . . 4

48 Fed. Reg. 8416
(February 28, 1983) . . . . . 5,6

48 Fed. Reg. 33432
(July 21, 1983) . . . . . 5,6, 8-9

# In the
# Supreme Court of the United States
**October Term 1992**
**No. 92-1379**

---

Michigan Road Builders Association, Inc., et al.,
*Petitioners,*
v.
The Director of the Michigan Department of Transportation,
in his official capacity, et al.,
*Respondents.*

---

## Petitioners' Reply Brief

---

Respondents attempt to frame Petitioners' challenge to Michigan's discriminatory minority preference program as an impermissable "collateral attack" on STURAA and the federal regulations themselves. In so doing, Respondents assume that their construction of STURAA and the federal regulations, as adopted by the lower courts, is correct. Respondents ignore the mandate of this Court that governmental affirmative action measures, whether mandated by Congress, formulated by executive agencies, or voluntarily enacted by the states, must be narrowly tailored to remedying identified prior discrimination. Respondents also overlook the fact that only Congress was given the "unique power" to enforce the equal protection guarantees of the Fourteenth Amendment; a federal agency cannot supply a legitimate justification for a state affirmative action program without specific findings of prior discrimination.

While it is true that, under Respondents' and the lower courts' construction of STURAA and the regulations, the federal affirmative action program which is used to justify Respondents' preference program would be unconstitutional as lacking the requisite narrow tailoring, Petitioners are not and need not challenge STURAA or the federal regulations in this lawsuit. This is because a contrary construction of STURAA and the federal regulations is not only available, it was intended by Congress and the Department of Transportation and, in any event, must be adopted by this Court to protect Petitioners' constitutional rights and to safeguard the constitutionality of an act of Congress.

Simply put, Petitioners are not attacking the constitutionality of either STURAA or the federal regulations; rather, Petitioners are challenging the constitutionality of Respondents' and the lower courts' **construction** of STURAA and the federal regulations. In essence, Petitioners' argument is that neither STURAA nor the federal regulations was intended or can constitutionally be construed to require the setting of unlimited state DBE goals above 10% based solely on the availability of DBE contractors, and, certainly, neither was intended or can constitutionally be construed to mandate the use of set-asides, no matter how "minimal," to guarantee attainment of goals in excess of 10%. Since the lower courts in this case have rendered opinions which are contrary to a constitutionally proper construction of an act of Congress and contrary to this Court's prior precedent, and since other lower federal courts appear to be utilizing the same erroneous reasoning, this Court should grant Petitioners' Writ to consider the important constitutional questions raised.

## 1. Neither STURAA Nor The Federal Regulations Were Intended To Require States To Set And Meet DBE Preference Goals Based Solely On The Availability Of DBE Contractors.

Respondents admit that they have made no findings of discrimination against minority contractors in the highway construction industry in Michigan. Respondents contend simply that they were required to adopt their program pursuant to STURAA and the federal regulations and that their program is therefore shielded in its entirety by an application of this Court's holding in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). However, without even applying a *Fullilove* analysis to determine the constitutionality of Respondent's construction of STURAA and the federal regulations, the fact remains that neither STURAA nor the federal regulations authorize, let alone require, the discriminatory program adopted by Respondents.

Certainly, STURAA itself does not require the adoption of unlimited state DBE preference goals based solely on the availability of DBE contractors in the various states. As argued fully in the initial Petition, STURAA established a 10% goal for DBE preferences - period. The "not less than" language of STURAA, contrary to Respondents' argument and the lower courts' holdings, does not evidence an intent to

require states to set or meet unlimited goals with 10% as simply a floor, and no legislative history exists which even hints that Congress intended to mandate such a result.

Further, Congress must be presumed to act consistently with constitutional requirements, and the Constitution clearly forbids standardless delegations of Congress' authority and requires that race-based affirmatice action measures be narrowly tailored to remedying prior discrimination. Thus, STURAA was not intended and cannot constitutionally be construed to permit, let alone mandate, individual states to set unlimited DBE goals above 10% based on the level of DBE contractors in the state.

As to the federal regulations implementing STURAA, these too were not intended to require states to meet or set unlimited goals above 10% based solely on the availability of DBE contractors. Respondents point to 49 CFR 23.41 to 49 CFR 23.45 and argue that, as a condition of receiving funds under STURAA, these sections required them to adopt their challenged program.[1] Respondents ignore the fact that Subpart D of Part 23, 49 CFR 23.61 to 49 CFR 23.69, comprises the federal regulations specifically implementing STURAA. A close examination of the regulatory history behind Part 23, and Subpart D in particular, illustrates that the Department of Transportation (DOT) did not intend to require recipients to set and meet unlimited goals above 10% under Subpart D.

49 CFR Part 23, as originally adopted by the DOT, became effective April 31, 1980, two years before the passage of the Surface Transportation Assistance Act of 1982 (STAA; the predecessor of STURAA). Under these original regulations, recipients of various types of federal funds, including highway funds in general, were required to create a minority business enterprise (MBE) program and to submit their program to the DOT for review and approval. 49 CFR 23.41(a)(2). As

[1] Respondents' argument in this regard appears to be derived solely from a letter Respondents received from the FHWA construing the federal regulations. Respondents' Brief at 10,11. However, the FHWA's opinion does not constitute a conclusive construction of the regulations and should not preclude an independant inquiry into the Department of Transportation's intented construction thereof.

part of their state MBE programs, recipients were required to adopt a statement to the effect that their policy would be to "maximize participation" of minority business enterprises, 49 CFR 23.43(a)(1), and were further required to "take all reasonable and necessary steps" to ensure that minority businesses had the "maximum opportunity to compete for and perform contracts." 49 CFR §23.43(a)(2). Consistent with this requirement, recipients were required to establish overall and contract goals for MBE participation which were "practical and related to the potential availability of MBE's in desired areas of expertise." 49 CFR 23.45(g)(1) & (2). 49 CFR 23.45(g)(5) set forth the procedure to be used in setting overall goals pursuant to section 23.41, which procedure did require recipients to set overall goals based on the availability of minority contractors to ensure that the goals set would be "practical."

However, under this original scheme, the goals were not to be "rigid numerical quotas." 45 FR 21178 (March 31, 1980)(copy of pertinent pages reproduced in Appendix hereto at App 1a-3a). As stated in the Federal Register, "[i]f the recipient or the contractor can show that it made reasonable efforts to try to meet the goal, it will be in compliance or can be awarded a contract despite its failure to meet the numerical goals." *Id.* (App at 3a). Thus, the "goals" to be set pursuant to the DOT's MBE program requirements were very flexible, recipients were not required to justify the goals they set, nor were they absolutely required to meet them. In essence, by requiring the setting of goals, the DOT was simply attempting to require recipients to "become familiar with existing MBE's and their capabilities" and to thereby encourage "maximum possible participation." *Id.* (App at 2a).

Thereafter, Congress enacted the Surface Transportation Assistance Act of 1982 (STAA), with its 10% **DBE** expenditure requirement, and the DOT proceeded to fashion **new** regulations specifically implementing STAA. These new regulations were adopted as Subpart D of 49 CFR Part 23, which subpart was entitled "Implementation of Section 105(f) of [STAA]."

The regulatory history surrounding the DOT's rulemaking pursuant to STAA is very telling with respect to what the new regulations required vis a vis goal setting and with respect to the relationship between the DOT's existing MBE program and the new DBE program mandated by

Congress. As stated in the Preamble to the Final Rule implementing STAA:

> [49 CFR Part 23] established requirements for recipients of Department of Transportation financial assistance. The key features of this regulation, in its current form, include requirements for recipients to set overall and contract goals, award contract goals, and certify the eligibility of firms to participate in DOT-assisted contracts as MBE's.
>
> [t]he Department's implementation of section 105(f) of [STAA] builds upon this existing rule. **The new Subpart D changes the way FHWA and UMTA recipients establish overall goals.**

48 FR 33432(July 21, 1983)(emphasis added)(copy of pertinent pages reproduced in Appendix hereto at App 15a-20a); see also, DOT's Notice of Proposed Rulemaking(NPRM), 48 FR 8416 (February 28, 1983)("[t]he new subpart [D] would affect recipients of federal financial assistance from FHWA and UMTA programs funded through [STAA]. UMTA and FHWA recipients would set overall goals **as provided in the new subpart rather than as provided in the existing regulation.**")(emphasis added)(copy of pertinent pages reproduced in Appendix hereto at 4a-14a).

As "one of the key provisions of the proposed regulation," the DOT stated in its Notice of Proposed Rule Making that recipients were required to "set overall goals of not less than 10%" or to justify setting lower goals pursuant to specific regulatory procedures. 48 FR 8416 (App at 6a).[2] The version of Subpart D contained in the initial NPRM also contained a subsection which indicated that states with high minority populations were "expected" to achieve goals above the 10% level, with the Administrator having the "full discretion" to disapprove goals below

[2] This was in contrast to the goal-setting procedure under the DOT's existing MBE program which provided for flexible goals to be set based on the availability of MBE contractors, with no numerical goal requirement and no procedures for recipients to justify specific goals to the DOT. See Preamble to NPRM. 48 FR 8416 (App at 5a-6a) (distinguishing the two goal-setting procedures).

the level which the Administrator believed could be reasonably achieved by the states. 48 FR 8416 (App at 6a-7a, 10a)(discussing and setting forth the original proposed version of 49 CFR 23.64).

In response to its NPRM, the DOT received numerous comments from interested parties arguing that even a 10% DBE goal could not realistically be achieved in many states and proposing that DBE goals should be set based on the same formula used to set MBE goals. In other words, opponents argued that goals should be set based on the availability of DBE contractors in the particular jurisdictions, with no requirement that the goals be set at 10% and no requirement of justifying goals below 10%. See App at 16a-18a.

The DOT rejected the proposals to establish a DBE goal-setting procedure under Subpart D based on the availability of DBE contractors, with no requirement of justifying goals below 10%, stating that, "[t]he Department already has a an MBE program with a goal-setting mechanism similar to that endorsed by many commentors opposing **the 10% goal requirement** of the NRPM." 48 FR 33432 (App at 18a) (emphasis added). The DOT pointed out that the DBE goals were not to be as flexible as those under the MBE program, and recipients would be required to justify DBE goals below 10%.

Perhaps most significantly for present purposes, the DOT completely eliminated the section of Subpart D contained in the NPRM which required states with high minority populations to set goals above 10%. No such requirement was contained anywhere in the final regulations as adopted in 1983, and no such requirement is contained today. Indeed, the final version of Subpart D contained a section, 23.66 (not contained in the NPRM), which specifically provided that "[t]he Administrator reviews and approves **any overall goal of 10%** or more." 49 CFR 23.66(a)(emphasis added).[3] Thus, the statements contained in the NPRM regarding setting goals above 10% and discussing the Administrator's discretion to disapprove goals which were not as high as

[3] Under the existing regulatory procedure of Subpart D, the Administrator's approval of goals which are at least 10% is purely *pro forma*. See *O'Donnel v District of Columbia*, No. 89-1867, 1992 U.S. Dist. LEXIS 19723, at * 34 (D.C.D.C., December 22, 1992) (On Remand).

he found achievable were rendered a nullity by the deletion of the applicable provision in the final regulation and by the addition of section 23.66.

Although the final rule retained the requirement that goals should be **submitted** for approval pursuant to the procedures already contained in the existing 23.45(g)(5), 23.45(g)(5) clearly was not intended to provide the basis for setting the goals in the first place under the final version of Subpart D. The DBE goals were to be set exclusively pursuant to Subpart D's 10% requirement, with an established procedure for justifying goals below 10%, and were to be submitted to the DOT pursuant to the procedures contained in existing Section 23.45(g)(5) for the DOT's **pro forma** approval.

Accordingly, contrary to Respondents' argument and the lower courts' holdings, the federal regulations were not intended by the DOT to require states to set unlimited DBE goals based on the availability of DBE contractors. The regulations did require states receiving federal funds other than those under STAA (STURAA) to set **MBE goals** based on the availability of minority contractors, which goals were to be inherently flexible, but this requirement did not extend to goal-setting under Subpart D's implementation of STAA.

It must also be noted that, even if the DOT did intend to require the setting and meeting of unlimited goals above 10% based on the availability of DBE contractors, which it did not, the federal regulations by themselves cannot be used by Respondents to shield **Respondents'** discriminatory program from constitutional attack. While Congress has been found to have broad authority to enforce the Constitution's equal protection guarantees by directing states to adopt narrowly tailored affirmative action measures in situations in which the state could otherwise not do so, the same authority does not extend to the bureaucracy of the Executive Branch. The Department of Transportation is entitled to no more deference than the states with respect to affirmative action programs, and Respondents do not contend that the DOT made any findings of prior discrimination to justify requiring adoption of goals above the 10% established as necessary by Congress to remedy the discrimination Congress found.

In short, Respondents cannot rely upon the DOT's regulations to supplant the necessity of Respondents making findings of prior discrimination to justify Respondents' affirmative action program in excess of the Congressional mandate. Only Congress is empowered to make the "critical determinations" necessary to support affirmative action, and, under STURAA, Congress only provided justification for state DBE programs with 10% DBE preference goals. Congress did not and constitutionally cannot be found to have mandated an open-ended preference program providing for unlimited state DBE goals based only on the availability of DBE contractors, and neither can the DOT.

## 2. Neither STURAA Nor The Federal Regulations Required The Use Of Set-Asides To Meet Unlimited DBE Goals, And Respondents' Use Of Set-Asides To Meet Their DBE Goal Above 10% With No Compelling State Interest Is Constitutionally Invalid.

In addition to Respondents' setting their DBE goal well above the 10% mandated by Congress, Respondents utilized a set-aside procedure to guarantee attainment of that goal, thus, in effect, transforming their "goal" into a quota. Again, Respondents argue and the lower courts found that federal law required the use of set-asides and that Respondents were just "conscientously" following federal law by their "limited use of 1.32% set-asides" to meet their 15% DBE goal.[4]

Again, neither STURAA nor the federal regulations mandates the use of set-asides to meet DBE goals above 10%. STURAA itself clearly contains no reference to the use of set-asides to meet DBE goals which exceed 10%, and neither does Subpart D of 49 CFR Part 23. Although DOT does state in the Preamble to the rulemaking under Subart D that, "section 23.45(k) [the MBE set-aside provision] continues to apply in the

[4] Note that Respondents argue that no constitutional question worthy of review is involved because of the relatively low percentage of contracts set-aside by their program. This argument is patently without merit. Aside from the fact that 1.32% set-asides in fact equalled more than four million dollars in contract benefits from which Petitioners' were completely excluded, if Respondents' use of set-asides to meet their 15% goal is unconstitutional, Petitioners' constitutional rights have been violated, and such a wrong should not be trivialized.

context of new Subpart D," 48 FR 33432 (App at 19a), the DOT also states that:

> [s]ection 23.45(k) of the existing DOT MBE regulation permits, but does not require, recipient[s] to use set-asides on contracts as a means of meeting overall goals. Recipients may chose to use set asides if they have the authority to do so. . . . neither section 105(f)[STURAA] itself nor this regulation require the use of set-asides on any particular contract.

*Id.* (App at 19a-20a).

Thus, even the federal regulations upon which Respondents rely to justify their use of set-asides were not intended to negate the requirement that recipients have "authority" to use them, nor were they intended to require their use, particularly to meet DBE goals in excess of 10%. As has been stated repeatedly herein and in the Petition, no authority exists in Michigan to justify Respondents' use of set-asides to meet DBE goals above 10%.

Accordingly, Respondents' **choice** to use racially based set-asides in their DBE preference program is unsupported by any legitimate constitutional justification. While set-asides may be appropriate in instances where states have independant authority to use them, such as where states have made findings of prior discrimination, such is not the case here. This Court should grant Petitioners' Writ if for nothing else than to invalidate Respondents' use of set-asides to meet their 15% goal, no matter how "limited" Respondents' use of set-asides might be. Respondents simply have no compelling justification to use set-asides to meet DBE goals in excess of 10% as clearly required by the Constitution and this Court.

## Conclusion

Under Respondents' and the lower courts' construction of STURAA and the federal regulations, Respondents' racially discriminatory preference program need not be narrowly tailored to remedying any identified prior discrimination. Congress and the DOT required DBE preference goals to be limited only by the availability of

DBE contractors in the state, and states need make no independant findings of prior discrimination to justify establishing racially based preference goals exceeding 10% or to use set-asides to assure attainment of those goals. Respondents assert that Petitioners conceded the legitimacy of this construction by conceding the constitutionality of STURAA and the federal regulations. This is simply not true.

While Petitioners do not challenge the constitutionality of STURRA or the federal regulations themselves, Petitioners do challenge the constitutionality of Respondents' **construction** of them as adopted by the lower courts. A construction which requires states to set and meet unlimited DBE goals above 10% was not and cannot constitutionally be found to have been mandated by Congress or the DOT. Even aside from the fact that such an unlimited preference program would clearly lack the narrow tailoring required by this Court to justify affirmative action and thus cannot be used to justify Respondents' discriminatory program, the language of STURAA and the history of the applicable federal regulations indicates that such a result was not in fact intended by either Congress or the DOT.

Since the construction urged by Respondents was constitutionally impermissable, and since a contrary construction was available and, indeed, intended by Congress and the DOT, the lower courts should have chosen the constitutionally permissable construction and invalidated Respondents' discriminatory preference program. The lower courts failed to do so, and this Court should grant Petitioners' Writ to determine the important constitutional questions involved.

*Respectfully submitted,*

John Bernard Weaver*
Daniel R.W. Rustmann
Susan Jezewski Evans
**Butzel Long**
150 West Jefferson, Suite 900
Detroit, Michigan 48226-4430
(313) 225-7000
**Attorneys for Petitioners**

March 29, 1993

*Counsel of Record

# Appendix

Final Rule, Participation By Minority Business Enterprises In Department Of Transportation Programs, 45 FR 21178 (March 31, 1980) (Pertinent Pages Only) . . . . . 1a

Notice of Proposed Rule Making, Participation By Minority Business Enterprises in Department of Transportation Programs, 48 FR 8416 (February 28, 1983) (Pertinent Pages Only) . . . . . 4a

Final Rule, Participation By Minority Business Enterprises in Department of Transportation Programs, 48 FR 33432 (July 21, 1983) (Pertinent Pages Only) . . . . . 15a

**Rules and Regulations**

# Department Of Transportation

**Office of the Secretary**

**49 CFR Part 23**

Participation by Minority Business Enterprises
in Department of Transportation Programs

Monday, March 31, 1980


**Agency:** Office of the Secretary, DOT
**Action:** Final Rule.
**Summary:** This final rule establishes a uniform program by which firms owned and controlled by minorities and women may participate in contracts let by recipients of financial assistance from the Department of Transportation (DOT). It supersedes all existing Minority Business Enterprise (MBE) regulations, orders, circulars and administrative requirements concerning financial assistance programs that the Department has issued. This rule requires recipients of DOT financial assistance to submit programs for increasing the participation of MBEs in their contracting activities. In particular, the regulation requires recipients to set goals for the participation of MBEs in both their overall programs and specific contracts.


* * *

## Section-by-Section Analysis

The following portion of the supplemental information discusses each section of the final rule. The analysis describes differences between the final rule and the NPRM and provides the Department's response to comments relevant to each section. It does not discuss each provision of the regulation in detail.

* * *

Section 23.45--Required MBE Program Components

This section describes in detail the requirements placed upon DOT recipients and their contractors. In response to comments and in order to clarify provisions of the regulation, a number of substantive changes have been made from the NPRM.

* * *

Paragraph (g) of this section, which deals with percentage goals for work awarded to MBEs, is one of the key provisions of the regulation. It has been changed in a number of respects. Subparagraphs (1) and (2) have been clarified. In particular, the subparagraph on contract goals now clearly specifies that the recipient set goals on a specific contract. The bidder or proposer must meet or exceed the goals or demonstrate why it could not despite its best efforts.

Paragraph (g) retains the two-goal structure of the NPRM. Recipients must set overall goals for their programs and contract goals for each contract under the program. Many commenters objected to this two-goal system, favoring one overall goal. The Department, believes, however, that the two-goal approach is necessary to increase MBE participation in programs receiving DOT financial assistance. Contract-specific goals have a short-range focus requiring contractors to seek sufficient MBE participation in each contract. Overall goals require recipients to make long-term plans, requiring recipients to become familiar with existing MBEs and their capabilities. To establish these goals, the recipient must consider not only existing MBEs but also the potential availability of new MBEs and the services they could provide. By requiring recipients to set both short-term and long-term goals, the rule should increase familiarity with and use of MBEs.

Some commenters argued that setting binding goals is illegal because it is equivalent to a quota system. The goal system set forth in this rule differs significantly from an impermissible quota system. Unlike quotas, these goals are flexible. They are not rigid numerical requirements. The recipients set them based on the availability of MBEs and the type of services they perform. More importantly, a recipient or

*contractor not meeting the numerical goals* is not necessarily precluded from winning a contract. If the recipient or the contractor can show that it made reasonable efforts to try to meet the goals, it will be in compliance or can be awarded a contract despite its failure to meet the numerical goals. Goals of this kind are not unlawful.

* * *

**Proposed Rules**

# Department Of Transportation

## Office of the Secretary

## 49 CFR Part 23

Participation by Minority Business Enterprises
in Department of Transportation Programs

Monday, February 28, 1983

**Agency:** Department of Transportation
**Action:** Notice of Proposed Rulemaking.
**Summary:** This proposed rule would implement section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that ten percent of funds authorized to be appropriated by the Act be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The proposed rule would add a new Subpart D to the Department's existing minority business enterprise rule, permitting recipients of financial assistance from the Department to comply with the new statutory requirement with a minimum of disruption to existing administrative practice.

* * *

Relationship to Existing Minority Business Enterprise Rule

The Department's minority business enterprise (MBE) rule (49 CFR Part 23) continues fully in effect. Promulgation of a final rule based on this NPRM (which would result in a new Subpart D of 49 CFR Part 23) would have no effect on recipients of Federal financial assistance from the Federal Aviation Administration, the National Highway Traffic Safety Administration and the Federal Railroad Administration. These recipients would continue to implement 49 CFR Part 23 without change.

The new subpart would affect recipients of Federal financial assistance from FHWA and UMTA programs funded through the Surface Transportation Assistance Act of 1982. UMTA and FHWA recipients would set overall goals as provided in the new subpart rather than as provided in the existing MBE regulation. However, this change and the associated amendments contained in this NPRM (relating to such matters as definitions, waivers, and compliance) would be the only changes FHWA and UMTA recipients would make in implementing their MBE programs.

In all other respects, FHWA and UMTA recipients would continue to implement the existing 49 CFR Part 23. For example, recipients would continue to operate their programs and goals for businesses owned and controlled by women without change. Recipients would continue to award individual contracts in the same way as now provided by 49 CFR Part 23, requiring the apparent successful competitor for a contract to make good faith efforts to meet contract goals. Recipients would also continue to examine and certify the eligibility of MBE's as they do now.

The major change made by this subpart would concern overall goals. Under the existing regulation, overall goals are simply an administrative mechanism designed to help recipients meet their obligation to ensure that MBEs have an equal opportunity to compete for and perform DOT-assisted contracts. The present overall goals are established by recipients as a benchmark against which they can measure the performance of their MBE programs. The goals represent a level of MBE participation which it is reasonable to expect, given fully equal opportunities for MBEs. Failure to meet an overall goal is not regarded as noncompliance with the regulation. Rather, it is an indication that administrative changes or improvements in a recipient's MBE program may be necessary.

Under the proposed rule, the Department sets recipients' overall goals at a minimum of ten percent, unless a waiver is granted in accordance with paragraph 23.65. Failure by a recipient to meet its overall goal is regarded as noncompliance with the regulation. The overall goals proposed by this NPRM, unlike the overall goals of the existing rule, go beyond seeking to ensure equal opportunities for MBEs. Rather, the overall goals of the proposed subpart implement the commitment of section 105(f) to an affirmative action policy designed to

overcome the effects of past discrimination and disadvantage. As proper for a policy of this kind, it is limited in duration.

* * *

Section 23.64 Overall Goals

Subsection (a) of this section is the key provision of Subpart D. Paragraph (a)(1) requires recipients of funds to which this subpart applies to set overall goals of not less than ten percent of the aggregate dollar amount of all Federal-aid highway and transit funds, respectively, to be expended in contracts during the forthcoming fiscal year. This means that recipients which receive funds from both UMTA and FHWA would have to set separate goals for their highway and transit programs. The Department solicits comment on ways to minimize administrative inconvenience that could result from such recipients (e.g., state DOTs) having to submit more than one goal to DOT. The requirements of this paragraph may be waived only through the procedures of § 23.65.
The reference to § 23.41 is intended to prevent the imposition of new administrative burdens on recipients who are not required to have an MBE program under the existing regulation (§ 23.41 would be amended to include all UMTA programs funded by the Act). The reference would ensure that a recipient which is not required to have an MBE program under § 23.41 (e.g., an UMTA recipient which receives less than $250,000 in UMTA assistance) would not have to create a program in order to comply with Subpart D. Recipients which are not required to have an MBE program would not have to submit overall goals to the Department under this subpart.

With respect to goals for UMTA transit programs, paragraph (a)(2) would give the UMTA Administrator discretion to permit an UMTA recipient to set an overall goal applicable to a particular grant, project, or group of grants or projects, even if the grants or projects involved are not confined to a given fiscal year. This approach may make more sense than an annual goal in some circumstances.

The Department strongly encourages recipients to exceed ten percent participation whenever it is possible to do so. Subsection (b) points out that, in areas with relatively high minority populations, such as large cities and highly urbanized areas, it is expected that recipients

will spend substantially more than ten percent of covered funds with MBEs. The Department will evaluate recipients' performance in this regard when considering the approval of goals and waiver requests.

Subsection (c) emphasizes that goals under this section are submitted to the FHWA or UMTA Administrator, as applicable, in the same manner and at the same time as overall goals are submitted under § 23.45(g)(3) for the remainder of recipients' programs under Subpart C of 49 CFR Part 23. In order for the recipient to be in compliance with Subpart D, the Administrator must approve the overall goal submitted under this section.

The Administrator retains full discretion with respect to the approval of overall goals. Even if the recipient has requested approval of an annual overall goal of ten percent or more, the Administrator need not approve it if he or she determines that the recipient can achieve a higher level of MBE participation during the fiscal year. For example, if a certain recipient has had a 15 percent overall goal in recent years and has met or come close to meeting that goal, the Administrator is free to disapprove a requested 11 percent goal and require the recipient's goal to be 15 percent. Under subsection (a), ten percent is a floor for recipient's overall goals, not a ceiling above which recipients may not be required to rise if doing so is reasonably achievable.

The statutory ten percent goal affects funds authorized by the Surface Transportation Assistance Act of 1982 for fiscal year 1983, which has already begun. Obviously, submission of overall goals under this section and requests for waivers under § 23.65 before the beginning of the fiscal year is not possible for this fiscal year. FHWA and UMTA will provide administrative guidance to recipients in the near future concerning the handling of these matters for fiscal year 1983.

Subsection (d) points out that work performed by firms owned and controlled by women, who are not also socially and economically disadvantaged individuals, cannot count toward goals under this subpart. This is because (aside from the few women who have received 8(a) certification from SBA) non-minority women are not defined as socially and economically disadvantaged individuals by section 8(d) of the Small Business Act and its implementing regulations. At the same time, recipients are required to continue to set separate goals for firms owned

and controlled by women under Subpart C of 49 CFR Part 23. Subpart D does not change recipients' programs for such firms at all.

* * *

Secretary of Transportation

1. For the reasons set forth in the preamble, the Department of Transportation proposes to amend Part 23 of Title 49, Code of Federal Regulations, by adding thereto a new Subpart D, to read as follows:

PART 23 -- [AMENDED]

* * * * * *

Subpart D--Special Provisions for Recipients of Funds Under the Surface Transportation Assistance Act of 1982

23.61 Purpose
23.62 Applicability.
23.63 Definitions.
23.64 Overall Goals.
23.65 Waivers.
23.66 Compliance.

Authority: Section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424).

§ 23.61 Purpose.

The purpose of this subpart is to implement section 105(f) of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424), concerning small business concerns owned and controlled by socially and economically disadvantaged individuals.

§ 23.62 Applicability.

This subpart applies to all Federal-aid highway funds authorized to be appropriated by Title I and section 202 of Title II of the Act, and to all urban mass transportation funds authorized to be appropriated by Titles I and III of the Act or by the Urban Mass Transportation Act of 1964, as amended, apportioned or allocated to recipients, which participate in DOT-assisted prime contracts or subcontracts.

§ 23.63 Definitions.

The following definitions apply to this subpart. Where these definitions are inconsistent with the definitions of § 23.5 of this part, these definitions control for purposes of Subpart D. The definitions of § 23.5 control for all other purposes under this part.

"Act" means the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424).

"Minority"--See definition of "socially and economically disadvantaged individuals."

"Minority business enterprise" or "MBE" means a small business concern (1) which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more socially and economically disadvantaged individuals; and, (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

"Small business concern" means a small business as defined pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

"Socially and economically disadvantaged individuals" means those individuals who are citizens of the United States and who are Black Americans, Hispanic Americans, Native Americans, or Asian-Pacific Americans and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to section

8(a) of the Small Business Act. For convenience, these individuals and groups are referred to as "minorities" in this subpart. Recipients may make a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged (the certification appeals mechanism of § 23.55 of this Part shall be available with respect to individuals alleged not to be socially and economically disadvantaged):

(1) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(2) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(3) "Native Americans," which includes persons who are American Indians, Eskimos, Aluets, or Native Hawaiians; and

(4) "Asian-Pacific Americans" which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, India, Pakistan, Bangladesh, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas.

§ 23.64 Overall goals.

(1) Each recipient of Federal-aid highway funds or urban mass transportation funds to which this subpart applies, that is required to establish an MBE program under § 23.41 of this part, shall set an annual overall goal of not less than ten percent of the dollar value of such funds to be used in DOT-assisted prime contracts and subcontracts during each fiscal year, unless the FHWA or UMTA Administrator has specifically granted a waiver under § 23.65 of this subpart.

(2) In appropriate cases, the UMTA Administrator may permit UMTA recipients to express this goal as a percentage of the funds for a particular grant, project, or group of grants or projects.

(2)(b) It is expected that recipients will spend substantially more than ten percent of covered funds with MBEs in areas of relatively high minority concentration, such as large cities and highly urbanized areas.

(2)(c) Each recipient shall submit the goals required by subsection (a) of this section to the concerned Departmental element for approval as provided in § 23.45(g)(3) of this part.8

(2)(d) Work performed by firms owned and controlled by women who are not socially and economically disadvantaged individuals shall not be counted toward goals under this subpart. Recipients shall continue to implement programs and goals for businesses owned and controlled by women as provided in Subpart C of this part.

§ 23.65 Waivers.

(1) Any recipient may request the Administrator of the concerned Departmental element to grant a waiver of the ten percent annual overall goal required by § 23.64(a) of this part.

(2) A separate waiver request shall be made for each fiscal year for which the recipient seeks a waiver.

(3) Each waiver request shall be accompanied by sufficient information to permit the Administrator to determine whether a waiver is justified, in accordance with the waiver criteria of subsection (b) of this section.

(4) The recipient shall make its waiver request before the beginning of the fiscal year to which it applies, no later than the time it submits its request for approval of its annual overall goal for that fiscal year.

(3) Recipients shall submit waiver request to the Administrator of the concerned Departmental element through the cognizant FHWA Division and Regional Offices or the UMTA Regional Office, as applicable. The FHWA Division and Regional Offices or the UMTA Regional Office forward the request to the Administrator, attaching their recommendation concerning whether the request should be granted, denied, or modified.

(3)(b) The Administrator of the concerned Departmental element shall evaluate requests for waivers according to the following criteria:

(3)(b)(1) Efforts to locate and utilize MBEs. This includes soliciting the aid of the Minority Business Development Adminstration, the Small Business Administration, the Department of Transportation's Office of

Small and Disadvantaged Business Utilization and other sources for locating MBEs. This also includes the recipient's efforts, through advertisements, publications, or other communications, to make MBEs aware of contracting opportunities. In connection with this criterion, the concerned Departmental element also reviews the growth of the recipient's annual overall MBE goals and accomplishments in the recent past.

(3)(b)(2) Initiatives to encourage and develop MBEs. The concerned Departmental element will consider all documented efforts made by the recipient to assist the formation and growth of MBE firms. This includes technical assistance and support services provided to MBEs and solicitation of available sources for assisting MBEs. For recipients of Federal-aid highway funds, this also includes soliciting the aid of the FHWA Supportive Services Program.

(3)(b)(3) The number of MBEs available for work on contracts covered by this subpart. An MBE directory or list of MBEs certified by the recipient shall be available for review. In no case shall the number of MBEs deemed available for work on the recipient's contracts be limited by state or local residency requirements or other formal or informal restrictions on the area from which MBEs are selected. In evaluating the availability of MBEs under this paragraph, the Administrator of the concerned Departmental element takes into account unusual circumstances, such as the expenditure of a significant portion of the recipient's funds in a single fiscal year on a large project requiring specialized expertise which available MBEs do not have.

(3)(b)(4) Efforts made by the state to remove legal or other barriers to the participation of MBEs in the recipient's contracts at a level sufficient to meet the recipient's annual overall goal. This includes such actions as lowering or waiving bonding requirements for MBEs, setting aside contracts for MBEs, assisting MBEs in the acquisition of capital and other resources necessary to effective participation, and eliminating or waiving licensing or prequalification requirements for MBEs. Difficulties caused by state or local law are not grounds for a waiver.

(3)(b)(5) The size of the minority population. This factor is of limited significance by itself, and wili be used in conjunction with other criteria.

(3)(b)(5)(1) The Administrator of the concerned Departmental element approves a waiver request only if he or she determines that the recipient has demonstrated that it is making all feasible efforts to meet its annual overall goals but will be unable to do so because there are not sufficient eligible and qualified MBEs.

(3)(b)(5)(2) Before acting on a waiver request, the Administrator provides the director of the Office of Small and Disadvantaged Business Utilization with an opportunity to review and comment on the waiver request.

(3)(b)(5)(3) If the Administrator grants the waiver, he or she establishes an adjusted annual overall goal that the recipient is required to meet for the fiscal year in question. The Administrator may condition the grant of a waiver on any reasonable future action by the recipient.

§ 23.66 Compliance.

(a) Compliance with the requirements of this subpart is enforced through the provisions of this section, not through the provisions of Subpart E of this part.

(b) Failure of a recipient to have approved annual overall goals, as required by § 23.64(a) of this subpart, or to have an approved MBE program, is noncompliance with this subpart.

(c) If a recipient fails to meet an approved annual overall goal in any fiscal year, it shall demonstrate to the Administrator of the concerned Departmental element why the goal should not be achieved and why meeting the goal was beyond the recipient's power to control.

(d) If the Administrator determines that the recipient's failure to meet an annual overall goal is not supported or adequately justified, the Administrator shall direct the recipient to take appropriate remedial action. Failure to take the remedial action directed by the Administrator is noncompliance with this subpart.

(d)(1) In the event of noncompliance with this subpart by a recipient of Federal-aid highway funds, the FHWA Administrator may take any action provided for in 23 CFR 1.36.

(d)(2) In the event of noncompliance with this subpart by a recipient of funds administered by UMTA, the UMTA Administrator may take appropriate enforcement action. Such action may include, pursuant to grant agreements, the suspension or termination of Federal funds or the refusal to approve projects, grants, or contracts until deficiencies are remedied.

§ 23.41 [AMENDED]

2. The Department also proposes to amend § 23.41(a) of Title 49 of the Code of Federal Regulations as follows:

a. By amending § 23.41(a)(2)(i) thereof to read as follows:

(i) Applicants for funds in excess of $250,000, exclusive of transit vehicle purchases, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems;

b. By amending § 23.41(a)(3)(ii) thereof to read as follows:

(ii) Applicants for funds in excess of $500,000, exclusive of transit vehicle purposes, under sections 3, 5, 9, 9A, 17 and 18 of the Urban Mass Transportation Act of 1964, as amended, and Federal-aid urban systems;

[FR Doc. 83-5187 Filed 2-25-83; 8:45 am]

Rules And Regulations

# Department Of Transportation

## Office Of The Secretary

## 49 CFR Part 23

Participation by Minority Business Enterprises in Department of Transportation Programs

Thursday, July 21, 1983

**Agency:** Department of Transportation
**Action:** Final rule; request for comments.
**Summary:** This regulation implements section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that, except to the extent that the Secretary determines otherwise, not less than ten percent of the amounts authorized to be appropriated under the Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals. The regulation adds a new Subpart D to the Department's existing minority business enterprise regulation. The Department also requests comments on § 23.67 of the final rule.

* * *

Background

The Existing Regulation

On March 31, 1980, the Department of Transportation published a regulation on "Participation by Minority Business Enterprise in Department of Transportation Programs" (45 FR 21172). This regulation, codified as 49 CFR Part 23, established requirements for recipients of Department of Transportation financial assistance. The key features of this regulation, in its current form, include requirements for recipients to set overall and contract goals, award contracts goals, and

certify the eligibility of firms to participate in DOT-assisted contracts as MBEs.

The Department's implementation of section 105(f) of the Surface Transportation Assistance Act of 1982 (STAA) builds upon this existing rule. The new Subpart D changes the way FHWA and UMTA recipients establish overall goals and also makes some changes concerning the eligibility of firms to participate in the program. Otherwise, the Department's program continues to operate in the same way as it is under the existing regulation.

* * *

Goals

Minority Contractor Comments

As one of the key provisions of the proposed regulation, the requirement of the NPRM that recipients have a ten percent overall goal, unless the Department granted a lower goal through the waiver process, generated a substantial amount of comment. Comments from minority contractors, their supporters in Congress, some local governments, and other organizations stressed that it was important for the Department to insist on recipients meeting ten percent goals. Doing so is necessary to comply with the statute, in their view. Moreover, they asserted that minority contractors were available in sufficient numbers to enable recipients to meet ten percent goals, if recipients and prime contractors were serious about using them. These commenters emphasized the need for recipients to make substantial efforts to assist minority businesses, such as technical assistance, relief from burdensome bonding requirements, and outreach to locate minority businesses.

Comments from Nonminority Contractors and Recipients

Most state transportation agencies (as well as a few transit authorities) and nonminority contractors who commented took a very different view of the availability of minority businesses. These commenters said that there were no sufficient MBE contractors available to permit some jurisdictions to meet a ten percent goal. Many of the state transportation agencies asserting that they could not meet a ten

percent goal were from small, relatively rural states with small minority populations. Some of these commenters cited specific information as to the numbers of minority businesses which they believed were available to work on their projects, saying that these small numbers and their remoteness from population centers with higher numbers of minority businesses made achieving higher goals very difficult.

These commenters also asserted that increases in goals to comply with section 105(f) would mean that virtually all MBE contractors would be fully employed in their own jurisdictions, and consequently unavailable to work elsewhere. These commenters also cited other reasons, like existing minority businesses having failed because of recent economic conditions and the concentration of minority businesses in certain specialty fields, as limitations on MBE availability.

In making a point that ten percent goals would be difficult to achieve, some commenters made the point that they would have to be sharp increases in MBE participation in many jurisdictions. For example, one nonminority contractor said that Illinois would have to increase its MBE participation over 500 percent in the four year period from 1982 to 1986 to make a ten percent goal. A general contractors' association cited sharp percentage increases that would be necessary in various states. Since many states and nonminority contractors believed that these jurisdictions are already straining to meet existing MBE goals, these large increases struck them as impossible to make.

As an alternative to a requirement that each recipient, absent a waiver, establish a ten percent overall goal, the nonminority contractors and recipients who believed that they could not make the ten percent goal offered an alternative. Essentially, the alternative was to continue the procedures of the existing regulation with respect to overall goals. That is, each state would submit a goal based on its own understanding of the MBE participation it was able to achieve. This overall goal would not be required to be ten percent or any other figure. FHWA or UMTA would have the same authority they have now to review and approve overall goals. If the recipient's goal was less than ten percent, the recipient would not have to make any special showing in order to justify the goal.

The alternative is explicitly premised on a view of the statute as setting a nationwide target for MBE participation that was not intended to result in the imposition of specific goal requirements on any particular recipient. This approach, the commenters contend, is the appropriate way for the Secretary to utilize what the commenters characterized as the "broad discretionary waiver authority" given her by the statute.

The Department's Response to the Comments

The Department already has an MBE program with a goal-setting mechanism similar to that endorsed by many commenters opposing the ten-percent goal requirement of the NPRM. It has made progress in improving MBE participation in DOT financial assisted program. However, with respect to the largest of these programs, the Federal-highway program, the level of minority business participation has remained well below ten percent. In section 105(f), Congress conveyed a clear message that it wanted disadvantaged participation to increase to ten percent. The Department has an obligation to comply with this statutory requirement.

The Department can succeed at meeting its obligation to ensure that ten percent of funds in the FHWA and UMTA programs are expended with disadvantaged businesses only to the extent that the Department's individual recipients set and meet goals at at least a ten percent level. If individual recipients do not set and meet goals of at least ten percent, it would be very difficult for the Department to argue that it was conscientiously attempting to carry out its responsibility under the statute to achieve an aggregate of a ten percent level of participation.

In section 105(f), Congress said that DOT shall expend not less than ten percent of funds authorized by the Act with disadvantaged businesses. By adding the phrase "Except to the extent that the Secretary determines otherwise * * *," Congress clearly provided an exception to this mandate. The Department believes, however, that to construe the statute to require nothing more with respect to setting goals than the provisions of the Department's existing regulation would result in the exception swallowing the rule. Had Congress desired the continued implementation of the Department's existing rule without change, Congress would not have passed section 105(f). The Department cannot nullify the intent of Congress by interpreting a statute calling for change in the Department's

performance to require no change. For these reasons a basic premise of the final regulation is that the ten percent participation requirement of section 105(f) will be met only if recipients set and meet goals of at least ten percent. This is why recipients for goals of less than ten percent must be supported by adequate justification.

The second major point made by commenters opposed to the NPRM's requirement for ten percent goals was that many recipients could not meet ten percent goals. If this is the case (and minority contractors who commented did not agree that it is), then, under the Department's final rule, recipients will have the opportunity to justify a goal lower than ten percent. The Department has no objection to approving a goal lower than ten percent for a recipient that is able to demonstrate that the reasonable expectation for disadvantaged business participation in its DOT-assisted program is less than ten percent. Approving lower goals in this fashion is a proper use of the exception authority granted of the Secretary by the introductory phrase of the statute. The existence of this mechanism for approving goals lower than ten percent should adequately handle the situation of those recipients who genuinely could not be expected to meet a ten percent goal.

* * *

Set-Asides, Quotas and Goals

For purposes of clarity, the Department believes that it is important to distinguish carefully among three terms often used in the discussion of programs to encourage the use of minority businesses. The first, of these terms is "set-aside." As used in 49 CFR Part 23, "set-aside" has a very narrow and distinct meaning. It refers to an arrangement in which a particular contract is reserved for competition solely among minority businesses. If a recipient's solicitation for bids on a given contract provides that only disadvantaged businesses may bid on the contract, and no one else need apply, the contract is a "set-aside."

Section 23.45(k) of the existing DOT MBE regulation permits, but does not require, recipient to use "set-asides" on contracts as a means of meeting overall goals. Recipients may choose to use "set-asides" if they have the authority to do so. Section 23.45(k) continues to apply in the context of the new Subpart D. However, despite the frequent reference

in comments to section 105(f) as a "set-aside" program, neither section 105(f) itself nor this regulation require the use of "set-asides" on any particular contract.

The second term is "quota." A "quota" is a flat numerical requirement that a recipient or contractor is required to meet in order to obtain a benefit. For example, if a recipient, in its solicitation for bids, provides that contracts must have ten percent MBE subcontracting participation to get the contract, regardless of circumstances or the good faith efforts that the contractor might make, the recipient has imposed a "quota." Likewise, if the Department told a recipient that must achieve a ten percent level of disadvantaged business participation or forfeit eligibility for Federal financial assistance, the Department would be imposing a "quota."

The key feature of a "quota" is that it is a simple numerical requirement that a recipient or contractor must meet, without consideration of any other factors. The recipient or contractor either makes the number or loses the benefit. Some commenters, principally nonminority contractors, used the term "quota" rhetorically to refer to the use of goals in the existing 49 CFR Part 23 or new Subpart D. This is an incorrect understanding of the term. Under the existing DOT regulation and the new Subpart D, the Department of Transportation does not operate a "quota" system. Neither the proposed nor final Subpart D could impose penalties or sanctions on recipients simply because they fail to meet an overall goal.

The third term is "goal." A "goal" is a numerically expressed objective which recipients or contractors are required to make efforts to achieve. The key requirement is to make efforts. Results are, of course, important, but compliance does not turn simply on quantifiable results. In the case of the overall goals established by Subpart D, this means that a recipient is not in noncompliance with the regulation simply because it fails to meet an overall goal. Rather, if the recipient is unable to meet the goal, it must explain its inability to do so and, if directed by the Administrator, take remedial steps.

* * *